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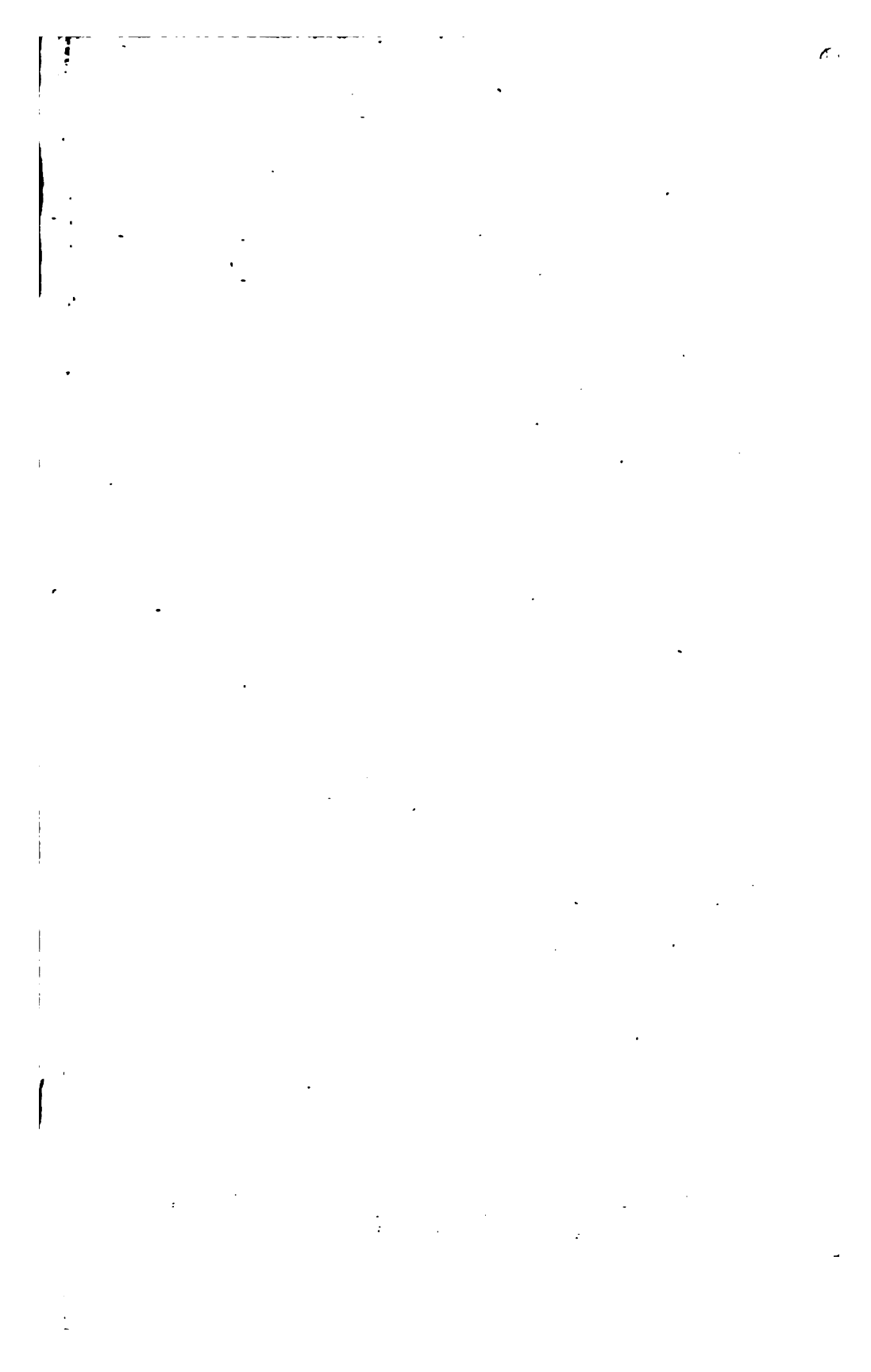


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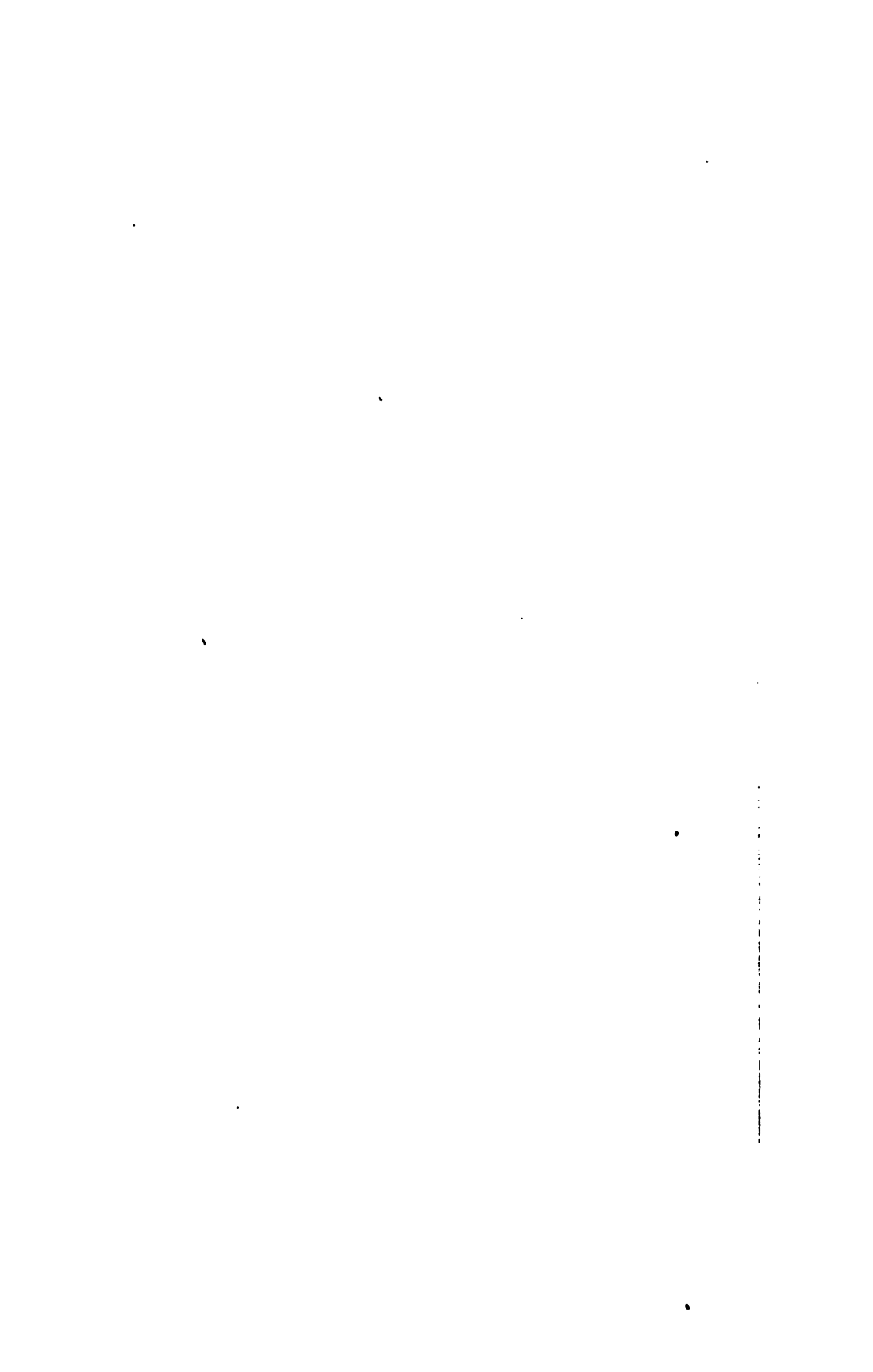
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BEING THOSE

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THE DISTRICT COURTS OF APPEAL OF THE
STATE OF CALIFORNIA**

BUT NOT

OFFICIALLY REPORTED

WITH

ANNOTATIONS

SHOWING THEIR PRESENT VALUE AS AUTHORITY

REPORTED AND EDITED BY

PETER V. ROSS

Of the San Francisco Bar

Author of "Inheritance Taxation," "Probate Law and Practice," etc.

VOLUME 5

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CASES DETERMINED
IN THE
SUPREME COURT OF CALIFORNIA
BUT NOT
OFFICIALLY REPORTED.

ADAMS v. DE BOOM.

No. 15,818; March 20, 1895.

39 Pac. 858.

Actions—Consideration—Harmless Error.—Where two actions between the same parties were consolidated, and judgment rendered for plaintiff in one action, it is immaterial, on an appeal by defendant, that the complaint in the other action did not state facts constituting a cause of action.

Actions—Consolidation—Findings.—An action to enforce a contract to convey land in consideration of plaintiff's doing certain grading, and an action to recover for the grading in three counts—First, the reasonable value thereof; second, the price therefor under a written contract; and, third, the value of extra grading—were consolidated. The court found for defendant as to the first action, and for plaintiff as to the second, on the second count, and for \$350 "in addition to said written contract." Held, that the finding of the additional sum related to and was supported by either the first or third count of the second action.

APPEAL from Superior Court, City and County of San Francisco; Eugene R. Garber, Judge.

Two actions by Edward Adams against R. C. De Boom. The actions were consolidated, and from a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Gordon & Young for appellant; Andrew Craig and W. T. Craig for respondent.

VANCLIEF, C.—The plaintiff brought two actions against the defendant on alleged causes of action assigned to him by James McCoy (numbered in the superior court, respectively, 41,597 and 41,598), which, by stipulation of the parties, were consolidated and tried together as one action. No. 41,598 was an action to enforce specific performance of a written contract between defendant and McCoy, whereby the former, on specified conditions, agreed to convey to the latter a lot of land in the city of San Francisco. The consideration for the conveyance was estimated at \$700, to be paid as follows: One-half (\$350) by grading certain lots for defendant, as specified in the agreement, and the balance in cash. It was alleged in the complaint that the lots had been graded according to the agreement, and that plaintiff, as assignee of the contract, had tendered to defendant the balance of \$350, and demanded a deed for the lot, and that defendant had refused to convey, etc. No. 41,597 was an action in three counts: The first to recover \$472.50 as the reasonable value of work and labor done by McCoy for defendant in grading certain lots at defendant's request. The second count differs from the first only in that the work is alleged to have been done under special agreement, whereby the defendant promised to pay for the work at a certain price per day's work. The third count is for extra work in furnishing and dumping upon defendant's property, at his request, five thousand cubic yards of "extra earth," the reasonable value of which was ten cents per yard, amounting to \$500. The court denied the equitable relief (specific performance) asked in No. 41,598, but found for plaintiff on the second count of the complaint in No. 41,597 in full, \$472.50, and, in addition thereto, found \$350 due plaintiff, but whether on the first or third count of No. 41,597 does not clearly appear, though it does appear that it was not for work done under the written contract of which specific performance was sought by No. 41,598. Upon these findings, judgment was rendered in favor of plaintiff for \$822.50. The defendant appeals from the judgment, and from an order denying his motion for a new trial.

Counsel for appellant claims nothing on the appeal from the order, but on the appeal from the judgment contends: (1) That the complaint in No. 41,598 for specific performance does not state facts constituting a cause of action; and (2) that the findings do not support the judgment for a larger

sum than \$472.50 founded on the second count of No. 41,597, and furnishes no foundation for the additional \$350.

1. No relief was granted on the complaint in No. 41,598, and therefore it is immaterial to appellant whether that complaint states a cause of action or not.

2. That the finding of the additional \$350 is a sufficient finding that defendant was indebted to plaintiff in that sum in addition to the sum of \$472.50 is unquestionable; and the only intelligible objection to it made by appellant is that it is improperly founded on the complaint in No. 41,598. This, however, is negatived by the finding itself, which states that the indebtedness of \$350 was for work and labor "in addition to said written contract," on which alone the complaint in No. 41,598 counted. Therefore, the finding in question must be attributed to the complaint in No. 41,597, and is sufficiently supported by either the first or the third count of that complaint. I think the judgment and order should be affirmed.

We concur: Haynes, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment and order are affirmed.

DE CAMP v. BRYSON.

No. 19,493; March 20, 1895.

39 Pac. 861.

Appeal.—Where the Evidence is Conflicting on All the material issues, an order granting a new trial by a judge who did not preside at the trial will not be disturbed, unless there is a clear abuse of discretion.

APPEAL from Superior Court, Los Angeles County; J. W. McKinley, Judge.

Action by Charles W. Bryson against C. E. De Camp. There was a judgment for plaintiff, and from an order denying a new trial defendant appeals. Affirmed.

Jay E. Hunter for appellant; J. T. Rearden and L. H. Valentine for respondent.

SEARLS, C.—This is an action to recover \$800 and interest paid by the assignor of plaintiff to the defendant upon a contract for the purchase of real estate from said defendant by plaintiff's assignor, and which contract was alleged to have been rescinded by said assignor by reason of a breach thereof by defendant. Plaintiff had judgment for \$871 and costs. Defendant moved for a new trial, which was granted. The appeal is by plaintiff from the order granting the new trial.

The cause was tried before Hon. W. P. Wade, judge of department 3 of the superior court in and for the county of Los Angeles, without a jury; written findings filed in favor of plaintiff upon which judgment was entered. Hon. W. P. Wade died before the motion for a new trial was perfected, and the statement on such motion was settled and the motion granted by Hon. J. W. McKinley, judge of department 6 of the same court. The motion was based largely upon the insufficiency of the evidence to support the findings. The specifications of insufficiency are quite full and explicit. The errors of law complained of did not warrant the interposition of the court, and it is urged by appellant that as the court granting the motion did not hear the testimony at the trial, or have the witnesses before it, it was in no better position to judge as to the propriety of granting the motion than this court, and hence that on this appeal the question should be passed upon precisely as though the motion for a new trial were submitted here. The evidence involved a substantial conflict upon nearly every important issue in the case, and we are unable to say, upon a review of the whole case, that the court below erred in granting the motion. The case was a close one, upon the facts, and we confess some doubt as to the propriety of the action of the court below; but, in the very nature of things, something must be conceded to the discretionary powers vested in courts of original jurisdiction. This consideration suffices to resolve our doubt in favor of the action of such court. The order appealed from should be affirmed.

We concur: Haynes, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the order appealed from is affirmed.

IN re WALKERLEY'S ESTATE.

Appeal of DOUGHTY et al.

S. F. No. 6; April 2, 1895.

40 Pac. 13.

Appeal—Notice.—An Appeal will be Dismissed where notice was not served on all parties interested.

APPEAL from Superior Court, Alameda County; W. E. Greene, Judge.

Appeal by Mary S. Doughty and others in the matter of the estate of William Walkerley, deceased. Dismissed.

Fox, Kellogg & Gray and B. B. Newman for appellants; H. Firebaugh, Fred. E. Whitney and Rogers & Paterson for respondents.

PER CURIAM.—The order heretofore made, denying the motion to dismiss three certain appeals of Mary S. Doughty and others, is hereby vacated; for, upon further examination of the papers and records, it appears that notice of the first appeal—that from the decree of distribution—was not served upon all of the parties in interest, for that it was not served upon F. E. Whitney, Esq., representing William Bacon and others, and that, therefore, it should be dismissed. Also, as to the appeals attempted to be taken from “the order, judgment, and decree settling the final account of executors,” no opposition being made to the motion to dismiss, and it being conceded upon argument by appellants’ attorney that the said last-mentioned appeals are imperfect, and have been abandoned, it is hereby ordered that each and all of said appeals be, and the same are hereby, dismissed.

In re BURDICK'S ESTATE.*

No. 15,869; April 2, 1895.

40 Pac. 35.

Executors—Appeal from Final Settlement.—An executor, who has appealed from all of a decree made in the final settlement and distribution of the estate, except that part settling such executor's account with the estate, cannot, on such appeal, object that the funds in his hands were found to be community property, and distributed accordingly.

Executors—Appeal.—A Distribution of a Part of a Devised Estate to trustees, at the special request of the sole devisee, will not be declared void on appeal because the record fails to show that such trustees established a legal claim to the property.

Executors—Distribution.—The Probate Court has Jurisdiction to declare certain property devised to testator's son to be community property, and to distribute it to the wife, who is not a legatee or devisee.

Community Property—Succession.—The Additional Right Acquired in community property by either the husband or the wife upon the death of the other is acquired by inheritance.

Executors—Who may Appeal from Final Settlement.—Persons claiming to be trustees of a devised estate, but who are neither heirs, devisees, nor legatees, and who have presented no claim against the estate, cannot appeal from a decree rendered in the final settlement of the estate.

Executors.—An Appeal cannot be Taken from an Order of the probate court refusing to postpone the final decree.

Community Property.—A Surviving Wife cannot be Deprived of her rights in community property by an act of the husband subjecting such property to the control of trustees for the use of others.

APPEAL from Superior Court, Alameda County; John Ellsworth, Judge.

Appeals by the executor of the estate of Stephen Powell Burdick, deceased, by A. W. Burdick and A. M. Sutton as trustees, and by A. W. Burdick individually, from a decree rendered in the final settlement of the estate, distributing one-half of the funds in the executor's hands to the wife as her interest in the community property. Appeal of the trustees dismissed, and decree affirmed.

*For subsequent opinion in bank, see 112 Cal. 387, 44 Pac. 734.

J. H. Craddock and R. S. Gray for appellants; Clarken & Ross for respondent.

TEMPLE, J.—The executor of the above estate filed his final account with a petition for settlement and for a distribution of the estate, December 12, 1892. He reported that he had in his hands, after payment of debts and expenses, \$1,855.41, from which he asked to be allowed attorney's fees and accruing costs, and prayed that the balance be distributed to the parties entitled thereto; that the testator left one child, Arthur W. Burdick, and a widow, Alice H. Burdick; that by his will his entire estate was left to his son. January 31, 1893, Alice H. Burdick filed her petition, claiming that there was other property belonging to the estate, and asked to have such property recovered for the estate. August 30, 1893, A. W. Burdick and A. M. Sutton asked to have the money in the hands of the executor distributed to them as surviving trustees of a trust, or that the entire estate be given to A. W. Burdick as sole legatee and devisee. The petitions were submitted, and taken under advisement. July 20, 1893, Burdick and Sutton filed a more elaborate petition, asking the court to distribute the money to them as trustees. October 9, 1893, the court denied the application of the widow to compel the executor to include other property, and ordered a distribution of the estate as community property. One-half of the money, at the special request of A. W. Burdick, was distributed to A. W. Burdick and A. M. Sutton, trustees, and the other one-half to the widow. At that time counsel for A. W. Burdick and A. M. Sutton, trustees, and for A. W. Burdick individually, asked the court to suspend entry of the order of distribution until the title of the fund could be determined by proper action in a court of general jurisdiction. This application was denied, and the court proceeded to settle the final account of the executor, and to distribute the property. Appeals are taken from this decree by the executor, by A. W. Burdick and A. M. Sutton as trustees, and by A. W. Burdick individually. The appeals are brought here together, and by stipulation all use the same transcript, and they have been argued and submitted as one appeal.

The executor states in his notice of appeal that he appeals from the whole decree, "except so much of said decree as settles the account of said executor, from which last-named

portion he does not appeal." The executor claims that the decree distributes the estate to strangers; that neither the trustees nor the wife, as to community property, are heirs, legatees, or devisees of S. P. Burdick, deceased, and those claiming through them are the only persons to whom distribution can lawfully be made. The executor cannot, on this appeal, claim that the court erroneously found the money to be the property of the estate, rather than the property of the trustee; for the court, in settling the final account, adjudged that he had the amount in his hands belonging to the estate, and from that part of the decree he does not appeal.

1. At first sight it would appear as though the court could not distribute property to the trustees. They are not named in the will, and could not, as such, be heirs. But the bill of exceptions does not profess to state all the evidence, and, in the absence of a contrary showing, we should presume that they made out a claim through some one legally entitled. If the statement that it was done at the special request of A. W. Burdick shows that there was no other warrant for the distribution, still I think it is not void. It shows that A. W. Burdick was the person entitled to it, and, if the other direction be void, still the distribution complies with the code. It describes the property, and names the person entitled to it, viz., A. W. Burdick. No other person could complain of it, and he cannot, for it was done at his instance. The executor questions the jurisdiction of the probate court to determine the common property, or to distribute it to the widow. He argues that the wife claims adversely to the estate, and not as heir, legatee or devisee. The estate can only be distributed to such persons, and those who have acquired title from them. He cites in support of his contention *Estate of Rowland*, 74 Cal. 525, 5 Am. St. Rep. 464, 16 Pac. 315. It was not decided in that case that the wife does not take one-half the community property upon the death of her husband as his heir, but that, when the community is dissolved by the death of the wife, the probate court, while administering the estate of the wife, has no jurisdiction of the community property. The Civil Code declares that in such case the community property goes to the husband without administration: Civ. Code, sec. 1401. Notwithstanding some unnecessary language in *Estate of Rowland*, it was only held that a controversy between the representative of the deceased

wife and the surviving husband as to whether certain property was common property or the separate property of the wife could not be determined by the probate court. It would not be necessary to concede that the probate court has not the jurisdiction claimed here, even if the wife does not take as heir. The question, then, would be, Has the statute conferred the jurisdiction, and was it within legislative power? The jurisdiction is expressly conferred: Civ. Code, sec. 1402. For thirty years before the adoption of our present constitution by the people the probate court had exercised the power without question. The constitution gives probate jurisdiction to the superior court. But I think, within the meaning of our laws, both husband and wife take such additional right as they acquire to the common property by the death of the other by inheritance. The disposition to hesitate to accept this conclusion does not arise from any ambiguity in our statutes, which I think, and shall presently show, are very clear upon the subject, but from the fact that during the existence of the community the relation of the wife to the property is, in some respects, quite different from that of a mere heir apparent. She had rights with reference to it which the courts will interfere to protect, and in case of the dissolution of the community by divorce her right to one-half the property immediately attaches, subject to the power of the divorce court to deprive her of it for her delinquency. But these statutory provisions do not show that the additional right which she acquires upon the death of her husband is not as heir, and the code seems quite clear upon the subject. Section 1334 of the Civil Code reads as follows: "A testamentary disposition to 'heirs,' 'relations,' 'representatives,' 'legal representatives,' or 'personal representatives,' or 'family,' 'issue,' 'descendants,' 'nearest' or 'next of kin' of any person, without other words of qualification, and when the terms are used as words of donation and not of limitation, vests the property in those who would be entitled to succeed to the property of such person, according to the provisions of the title on succession in this code." Section 1383 defines "succession": "Succession is the coming in of another to take the property of one who dies without disposing of it by will." The next section shows that the person taking by succession is an heir, and that his right is subject to the control of the probate court and the possession of the ad-

ministrator. Certain provisions then follow in regard to succession, down to section 1400, which is as follows: "The provisions of the preceding sections of this title as to the inheritance of the husband and wife from each other apply only to the separate property of the decedents." The next section provides for the succession to the community property in case of the dissolution of the community by the death of the wife. Section 1402 provides for the succession in the case of the death of the husband. It is as follows: "Upon the death of the husband, one-half of the community property goes to the surviving wife and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition goes to his descendants, equally, if such descendants are in the same degree of kindred to the decedent; otherwise, according to the right of representation; and, in the absence of both such disposition and such descendants, is subject to distribution in the same manner as the separate property of the husband. In the case of the dissolution of the community by the death of the husband the entire community property is equally subject to his debts, the family allowance, and the charges and expenses of administration." The sections following provide for other cases of succession, and the heading of the title is "Succession." The statute therefore indicates very plainly that the wife acquires her right of absolute property in one-half of the community property, upon the death of her husband, by inheritance. Nor does this conclusion narrow or in any way limit the views which have hitherto prevailed in regard to the rights of the wife with reference to the community property during the life of her husband. From what has already been said, it is quite obvious that the appeal of the trustees must be dismissed. They are not named in the will, could not be heirs, and have presented no claim against the estate. Nor do they show any right acquired from heir, legatee, or devisee. They are not, and could not have been, aggrieved persons. The order refusing to postpone the final decree is not appealable. Indeed, I do not now think of any order made in the course of the administration from which these trustees could appeal. Arthur W. Burdick, as devisee or heir, was not aggrieved because the court did not distribute the money to the trustees, or because the court erroneously distributed it as part of the estate of S. P. Burdick. On the hearing, Arthur W. Burdick

announced through his counsel that he claimed nothing as devisee. Nor has such claim been made on this appeal. But, waiving this, and supposing appellant here contending that the court erred in holding that the property was community property, but should have decided that it was the separate property of S. P. Burdick, deceased, and that, therefore, he was entitled to the whole of it as sole legatee and devisee, there is nothing in the record upon which a decision in his favor could be based. The bill of exceptions does not purport to state all the evidence taken, and the decision may have been fully sustained by evidence not brought up. But, conceding that all the evidence is there set out, the conclusion of the court is correct. There is no evidence tending to show that any property was the separate property of S. P. Burdick, unless it was converted into such by the creation of the trust set out in the petition of the trustees. Conceding that the money there invested was community property, as we must presume it was, we have no difficulty in determining that the surviving wife could not be deprived of her rights with reference to it by any such device. The appeal of the trustees is dismissed, and as to the other appellant the decree is affirmed.

We concur: Henshaw, J.; McFarland, J.

BANK OF UKIAH v. GIBSON et al.*

No. 16,662; April 3, 1895.

39 Pac. 1069.

Chattel Mortgage on Livestock—Record as Notice.—Civil Code, section 2955, provides for chattel mortgages on certain property; and section 2957 provides that the record of such mortgages shall be constructive notice, and that mortgages not recorded shall be void as against subsequent creditors and purchasers. Held, that the act of March 9, 1893, amending section 2955, so as to authorize mortgages on sheep and neat cattle, does not entitle a mortgage on such stock, executed before the passage of such act, to be recorded, so as to render its record, made after the passage of the act, constructive notice.

*For subsequent opinion in bank, see 109 Cal. 197, 41 Pac. 1008.

Chattel Mortgage on Livestock—Validity.—A Chattel Mortgage on property other than that authorized to be mortgaged by the Civil Code, section 2955, is as a common-law mortgage, valid against all persons except subsequent creditors of the mortgagor and bona fide purchasers.

APPEAL from Superior Court, Mendocino County; R. W. Crump, Judge.

Action by the Bank of Ukiah against E. S. Gibson and others to foreclose a mortgage. From a judgment denying plaintiff a foreclosure as to part of the property, it appeals. Affirmed.

J. A. Cooper for appellant; J. M. Mannon, T. L. Carothers, J. W. Oates, J. Q. White and J. H. Seawell for respondents.

SEARLS, C.—This is an action by the Bank of Ukiah (a corporation) to foreclose two mortgages executed by E. S. Gibson, to secure the payment of a promissory note made by him to said bank. One of the mortgages was upon certain real property, and the other a chattel mortgage upon three thousand five hundred head of sheep, more or less, and one hundred head of neat cattle, more or less, upon a certain ranch therein described. The court entered a decree in favor of plaintiff for the foreclosure of the mortgages and sale of the real property and the neat cattle, but denied a foreclosure as to the sheep. Plaintiff appeals from so much of the decree as denied to it a foreclosure and sale of the sheep, etc., described in the complaint and chattel mortgage. The cause comes up on the judgment-roll, without a statement or bill of exceptions.

Under these circumstances, the question for determination is, Do the findings support the decree? All reference to the mortgage upon the real estate may be omitted, as no question is made in regard to it. As to the chattel mortgage, the following facts, drawn from the pleadings as admitted and from the findings, will serve to an understanding of the legal question involved. On the thirtieth day of June, 1892, at Ukiah city, Mendocino county, the defendant E. S. Gibson made to the Bank of Ukiah, the plaintiff herein, his promissory note for \$29,917.88, payable one year after date, with interest at ten per cent per annum, etc. To secure the pay-

ment of this promissory note, defendant executed to plaintiff a chattel mortgage upon certain personal property, then being upon that certain ranch of defendant Gibson, in the county of Mendocino, known as "Island Mountain Ranch," said personal property so mortgaged consisting of three thousand five hundred head of sheep, more or less, and one hundred head of neat cattle, more or less, being all the sheep and cattle owned by defendant Gibson on said ranch. The mortgage was made, executed, acknowledged, and verified in all respects as provided and required by section 2957 of the Civil Code, except that it was not recorded until May 9, 1893, when it was duly recorded in the office of the county recorder in and for the county of Mendocino, in which county the parties resided and the property was situate. The mortgagor, E. S. Gibson, retained possession of the mortgaged property. It may be remarked here, by way of parenthesis, as it is not within the findings, that, at the date of the execution of the mortgage, neat cattle and sheep were not among the articles of personal property upon which personal mortgages could be made under section 2955 of the Civil Code, but that on the ninth day of March, 1893, said section 2955 was amended so as to include "neat cattle, horses, mules, swine, and sheep, and the increase thereof." Subsequent thereto, and on the ninth day of May, 1893, the mortgage was recorded as before stated. After the recording of said mortgage, viz., after May 9, 1893, the defendant T. J. Welden, with full knowledge of the existence and recording of said mortgage, and without the knowledge or consent of the plaintiff, purchased from defendant E. S. Gibson, at the ranch of the latter in Mendocino county, the said neat cattle and sheep so mortgaged, and drove the sheep hence to Drury's corral, in the county of Humboldt, where on May 19, 1893, he sold and delivered them to the defendant Mrs. M. C. Drew, who purchased said sheep in good faith, for a valuable consideration, and without notice in fact of the mortgage of the plaintiff, and without knowledge that Gibson ever owned the sheep. The contract for the purchase of the sheep between Mrs. Drew and Welden was made at Ukiah, in Mendocino county, before the sheep were driven from said county, but she was not aware of that fact, and went with Welden to said Drury's corral, Humboldt county, the day the sheep were driven thither from Humboldt county, viz., May 19, 1893. Welden, when he purchased

the mortgaged property from defendant E. S. Gibson, gave to the latter an agreement to pay \$2.50 per head for the old sheep, and \$20 per head for the cattle. Lambs and calves were to be thrown in. He has paid nothing on account thereof, and the court finds that said Welden "is not the owner of the neat cattle described in the complaint, and his title and claim thereto is not paramount to plaintiff's mortgage, and he is not the purchaser of said property in good faith or for value without notice." As before stated, the sheep were removed from Mendocino to Humboldt county May 19, 1893, and within ten days thereafter, viz., May 29, 1893, plaintiff's chattel mortgage was duly recorded in said county of Humboldt. The chattel mortgage authorized the mortgagee, upon default in the payment of the promissory note, to take possession of all the mortgaged property, and dispose of the same according to law.

In the early history of California as a state, section 17 of the statute of frauds provided that "no mortgage of personal property hereafter made shall be valid against any other person than the parties thereto, unless possession of the mortgaged property be delivered to and retained by the mortgagee." In 1857 an act was passed under which certain personal property might be mortgaged by complying with its provisions, one of which involved recording, which should be valid without delivery of the property to the mortgagee: Stats. 1857, p. 347. This act provided also that such mortgages should not be valid (except between the parties) unless the statute was complied with. This act was again amended in 1861: Stats. 1861, p. 197. This last act also left mortgages of personal property absolutely void, except between the parties, save upon a compliance with its provisions, or where accompanied by a delivery of the property to the mortgagee and retention of possession by him. Under these statutes, the decisions of this court were to the effect: (1) The provisions of the statute only applied to the specific articles of personal property therein enumerated; (2) that where the provisions of the statute were not complied with, and as to mortgages of personal property not therein provided for, the mortgage was absolutely void (except between the parties thereto), unless accompanied by a delivery of the property to the mortgagee: *Gassner v. Patterson*, 23 Cal. 299; *Meyer v. Gorham*, 5 Cal. 323; *Stringer v. Davis*, 30 Cal. 318; *Glenn v. Arnold*,

56 Cal. 631. Under our Civil Code (section 2957), "a mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and encumbrancers of the property in good faith and for value, unless (1) it is accompanied by the affidavit of all the parties thereto that it is made in good faith and without any design to hinder, delay, or defraud creditors; (2) it is acknowledged or proved, certified and recorded in like manner as grants of real property." The distinction between the former statute and the section of the code quoted supra is this: Under the former law, a mortgage which failed to comply with its provisions was void as against purchasers. Now it is only void as against subsequent purchasers in good faith and for value; that is to say, against those who purchase without notice and for a valuable consideration. A mortgage of personal property not specified in section 2955 of the Civil Code may be made, and, if possession of the mortgaged property is delivered to the mortgagee, it is good against all the world. If no such possession is delivered to the mortgagee, it is still valid between the parties and against purchasers with notice: *Tregear v. Water Co.*, 76 Cal. 537, 9 Am. St. Rep. 245, 18 Pac. 658; *Works v. Meritt* (decided January 5, 1895), 105 Cal. 467, 38 Pac. 1109. Recording a chattel mortgage upon articles provided to be mortgaged by section 2955 of the Civil Code, takes the place of and serves in lieu of the delivery of possession essential to the validity of the mortgage in other cases: *Berson v. Nunan*, 63 Cal. 550; *Cardenas v. Miller* (Cal.; decided March 13, 1895), 39 Pac. 783.

The case, then, stands thus: Plaintiff had a chattel mortgage, which at the date of its execution was valid between it and the mortgagor, and as against purchasers with notice, or without value, but which was void as against creditors or purchasers in good faith and for value, for two reasons: (1) Because the property mortgaged was not such as is specified in section 2955 of the Civil Code, and the recordation thereof would not therefore have imported constructive notice; and (2) because possession of the mortgaged property was not delivered to the mortgagee. Subsequently, and before any purchaser intervened, the statute (section 2955, *Id.*) was amended so as to include among the articles which might be mortgaged under it neat cattle and sheep. Thereafter plaintiff recorded its mortgage, and, subsequently thereto, defend-

ant Drew purchased the sheep without other notice than that imparted by the record. Did she take subject to the chattel mortgage of plaintiff, the appellant here? We are of opinion the question should be answered in the negative. Section 3 of the Civil Code provides that "no part of it is retroactive unless expressly so declared." We find no declaration showing a legislative intent to apply the amendment of 1893 to section 2955 of the Civil Code to past transactions, and hence must hold that it does not so apply. The case then stands thus: Plaintiff had an attempted chattel mortgage upon certain sheep, which, as against creditors and subsequent purchasers in good faith and for value, was absolutely void as a statutory mortgage, for the reason that it was given upon property not provided for in the statute, and therefore incapable of being mortgaged: *Jones, Chat. Mortg.*, sec. 122; *Stringer v. Davis*, 30 Cal. 318; *Gassner v. Patterson*, 23 Cal. 299; *Glenn v. Arnold*, 56 Cal. 631; *Dufficy v. Shields*, 63 Cal. 333; *In re Fischer*, 94 Cal. 523, 29 Pac. 961. Such a mortgage, not being accompanied by possession in the mortgagee, lacked, as against innocent purchasers and creditors, the vitalizing force of law requisite to give to it effect, and fell stillborn. The amendment to section 2955, adopted March 9, 1893, made it possible thereafter to give chattel mortgages upon neat cattle and sheep, but did not and could not, unless it had a retroactive effect, breathe life into a dead mortgage of the past. To make a chattel mortgage of an instrument, which was not and could not possibly be such at the date of its execution, by force of a law subsequently passed, is to give a retroactive effect to such law. In Pennsylvania, a statute passed in 1833 required that a testator's mark to his name, at the foot of a testamentary paper, should be accompanied by his express direction to the person who wrote his name to write the same; and the court had decided that, without proof that the name was written by the express direction of the testator, the will was invalid. In 1848 the legislature passed a statute declaring that "every last will and testament heretofore made, or hereafter to be made, . . . to which the testator's name is subscribed by his direction, or to which the testator has made his mark or cross, shall be deemed and taken to be valid": *Laws 1848*, p. 16. In *Greenough v. Greenough*, 11 Pa. 489, 51 Am. Dec. 567, the supreme court of that state held the amendatory

statute invalid, so far as applicable to last wills executed before its passage. This ruling was upon constitutional grounds, and in the absence, so far as appears, of any statute like the third section of our code, confining statutes to prospective action.

It follows that, (1) independent of the chattel mortgage act, the mortgage was valid as against Gibson, the mortgagor, and Welden, who purchased with actual notice of its existence; (2) that as against the respondent Mrs. M. C. Drew, who was an innocent purchaser of the sheep for value, without notice, the mortgage was void, both as a common-law and a statutory mortgage of personal property. The judgment appealed from should be affirmed.

We concur: Belcher, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

JONES v. SHUEY et al.

No. 15,727; April 3, 1895.

40 Pac. 17.

Mechanic's Lien—Pleading and Proof—Variance.—Where the claim of mechanic's lien, and the complaint in an action to foreclose the lien, alleged a contract to pay plaintiff \$3.50 per day, and a contract to pay the reasonable value of his services was proved, and such value was shown to be \$2.84 per day, the variance is fatal.

Tender—Whether must be Unconditional.—A tender, to be valid, must be unconditional.

APPEAL from Superior Court, Contra Costa County; Joseph P. Jones, Judge.

Action by L. S. Jones against J. A. Shuey and the Southern Pacific Company. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Reversed.

W. S. Tinning for appellants; R. H. Latimer for respondent.

PER CURIAM.—This is an action to foreclose a mechanic's lien. The defendant Shuey is the lessee of the land upon which the building is situated, and his codefendant is the owner thereof. The contractor is not made a party to the action. The plaintiff is a carpenter who was hired by the contractor, and he subsequently filed his notice of lien, wherein he stated that he was "to work on the building or structure then being erected on said land, for the sum of three and fifty one-hundredths dollars per day, for each and every day said L. S. Jones worked on said building or structure." The allegations of the complaint as to the character of the contract were in line with the claim of lien, but upon the evidence offered at the trial the court in effect found the contract not to be express, but implied, as to the amount of wages to be paid; and, as we construe the finding, found that plaintiff was to be paid whatever sum his services were reasonably worth; and also further found that such services were reasonably worth the sum of \$2.84 per day. It thus appears that the contract proven is not the contract alleged, neither is it the contract set out in the notice of lien, and the variance is so broad and so material as to demand a reversal of the judgment. The identical question here presented arose in the very recent case of *Wagner v. Hansen*, 103 Cal. 104, 37 Pac. 195, and a reversal of the judgment was the result: See, also, *Reed v. Norton*, 90 Cal. 599, 26 Pac. 767, and 27 Pac. 426. The court was justified in holding that no valid and legal tender had been made. A tender must be unconditional: *Brown v. Gilmore*, 8 Greenl. (Me.) 107, 22 Am. Dec. 223. We also think the demurrer to the complaint was properly overruled. The court found as a fact that Walton, the contractor, was the agent of both defendants, and rendered judgment against them accordingly. There is no evidence whatever in the record to support a finding to that effect. For the foregoing reasons, the judgment and order are reversed, and the cause remanded.

HEIM et al. v. BUTIN.*

No. 15,798; April 4, 1895.

40 Pac. 39.

Mortgage Foreclosure—Agreement to Purchase—Deficiency Judgment.—Plaintiffs, having executed a note and mortgage to defendant, conveyed the mortgaged property to another, who assumed the payment of said note and mortgage, but he having defaulted thereon, defendant agreed with plaintiffs to purchase the land at the foreclosure sale for the full amount of his claim, and not to take a personal judgment against plaintiffs, and the latter, relying on such promise, allowed default to be entered, and refrained from attending the sale. Held, that there was a sufficient consideration for such agreement. Such agreement was not void as altering the terms of the note and mortgage. Nor was it void as an agreement to prevent bidding at the sale.¹

Mortgage Foreclosure—Deficiency Judgment.—The Complaint, in a Suit to Enjoin the Enforcement of a deficiency judgment, obtained against plaintiffs in such foreclosure suit, alleged that plaintiffs, relying on defendant's promise, failed to appear in the suit, or to be present at the sale, or make any bid thereat, though they were able to purchase the property and protect themselves. Held, that the complaint showed that plaintiffs were damaged by their reliance on defendant's promise, they having a right to demand that the deficiency judgment be entered also against the owners of the property.

APPEAL from Superior Court, Sonoma County; S. K. Dougherty, Judge.

Action by Ella M. Heim and another against James M. Butin to restrain the enforcement of a personal judgment. From a judgment of nonsuit, plaintiffs appeal. Reversed.

William H. Jordan and W. A. Richardson for appellants; W. E. McConnell and J. A. Barham for respondent.

*For subsequent opinion in bank, see 109 Cal. 500, 50 Am. St. Rep. 54, 42 Pac. 138.

¹ Cited with approval in *Moore v. First Nat. Bank of Florence*, 139 Ala. 607, 36 South. 781, where it was said that "the withholding by agreement of competition for business, though the business involve but a single transaction, is, when not opposed to public policy, a valuable consideration on which to rest the agreement."

BELCHER, C.—The plaintiffs brought this action to obtain a perpetual injunction restraining the enforcement of a deficiency judgment entered against them in a suit to foreclose a mortgage. The facts stated in the complaint are in substance as follows: On or about December 30, 1887, the plaintiffs, Ella M. Heim and Julius F. H. Heim, her husband, executed to the defendant their promissory note, bearing interest at the rate of six per cent per annum, payable monthly in advance, and, if not so paid, to become immediately due, at the option of the holder thereof. At the same time, to secure payment of the note, they executed to the defendant a mortgage upon certain real property in Sonoma county. Subsequently they conveyed the mortgaged property to other parties, upon the express condition that the grantees should assume the payment of the said note and mortgage. Thereafter, about September 1, 1891, the grantees having failed to pay the interest on the note, “and the said defendant herein having elected and declared said note to be due and payable, defendant herein, being requested by plaintiff Ella M. Heim to commence proceedings for the foreclosure of said mortgage, did agree with her that he would commence an action for such foreclosure, and, upon obtaining judgment in said cause and a decree of court directing the sale of said property to satisfy said judgment, he, this defendant, would at such sale purchase the same for the amount of such judgment obtained, including interest and costs at that time accrued; and he, the said defendant, did expressly agree with the said plaintiff that no personal judgment in said action should ever be entered or docketed against plaintiffs, or against either of them.” On September 11, 1891, defendant commenced an action in the superior court of Sonoma county to foreclose his said mortgage; and such proceedings were had therein that on January 4, 1892, judgment, foreclosing the mortgage, and directing a sale of the mortgaged premises to satisfy the same, was duly given and made against the defendants therein (plaintiffs herein), for the sum of \$4,702.25, and \$250 attorneys’ fees. Thereafter, on February 29, 1892, the mortgaged property was sold by the sheriff of the county under and by virtue of said judgment. “That these plaintiffs relied upon said promise and agreement of the said defendant, and, so relying and believing that said defendant would keep and perform the same, these plaintiffs,

and both of them, failed to appear or answer in said foreclosure suit though made parties thereto, and permitted their defaults to be entered therein; and thereafter, so relying and believing in said promise of defendant, they abstained from being present at said sale, or taking any step whatsoever to obtain a purchaser for said property, so that their interests in said judgment might be protected and exonerated; and these plaintiffs, and both of them, furthermore did, by reason of their reliance upon said promise of defendant, refrain from making or causing to be made any bid at said sale, although at that time they were fully able to purchase said property for the amount of said judgment, and thereby to protect themselves against said judgment." Notwithstanding his said promise, and in violation thereof, the defendant failed to purchase the property at said sale for the amount of said judgment, but instead thereof purchased the same for the sum of \$4,200. From this sum were deducted the sheriff's commissions and expenses in making the sale, leaving \$4,195.95, which was credited upon the judgment; and thereafter, on the same day, in violation of his said agreement, the defendant caused a personal judgment to be docketed in said cause against these plaintiffs, and each of them, for the sum of \$918.43, which personal judgment has since remained and still is in full force and effect against them. Defendant has refused to cancel said judgment so far as these plaintiffs are concerned, and now threatens to take out an execution against them, and to satisfy the same by the sale of other property belonging to them, to their great and irreparable detriment and harm. No demurrer to the complaint was interposed. Defendant answered, denying that he made the promise or agreement set out in the complaint, admitting that he caused a deficiency judgment for \$918.43 to be docketed in the said action on February 29, 1892, and that the judgment so docketed has been and still is in full force and effect against the plaintiffs, but denying that the same was docketed in violation of any such promise or agreement as is alleged in the complaint, or in violation of any promise or agreement of defendant with plaintiffs, or either of them, or with anyone else. At the trial it was proved, without objection, that the plaintiff Ella M. Heim, purchased the mortgaged property from the defendant for the sum of \$5,500, and that the terms of the purchase were \$600 cash,

one note for \$500, due on or before January 1, 1889, and one note for \$4,400, due on or before January 1, 1893; both notes drawing interest at six per cent per annum, payable monthly in advance, and secured by a mortgage on the property executed by her and her husband. The plaintiffs then sought to prove the agreement as alleged, and that they relied and acted upon it, and therefore did not appear in the foreclosure suit, the improvements placed upon the property during the time Mrs. Heim owned it, and its value at the time of the foreclosure, and that but for the agreement they or one of them would have been present at the sale, and bid in the property for the purpose of protecting themselves. This evidence was all objected to by defendant, upon the ground, among others, that the complaint did not state facts sufficient to constitute a cause of action, and the objections were sustained, the plaintiffs reserving exceptions. No further evidence was offered by the plaintiffs, and the cause was then submitted on their behalf. Thereupon counsel for defendant moved for a nonsuit, upon the ground that the complaint did not state facts sufficient to constitute a cause of action, and the plaintiffs had not proved anything that would entitle them to recover. The motion was granted, and from the judgment and an order denying their motion for a new trial the plaintiffs appeal.

The question, then, is, Did the complaint state a cause of action? If it did, the court erred in excluding the offered evidence and in granting the nonsuit. It is claimed for respondent that the complaint was insufficient, because the agreement set up was without any consideration and void. Section 1605 of the Civil Code provides: "Any benefit conferred, or agreed to be conferred, upon the promisor by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise." Under this provision, if, as alleged, the plaintiffs, in reliance upon the defendant's agreement, allowed their defaults to be entered and refrained from being present and bidding at the sale, thus surrendering their legal rights, a benefit was conferred upon the defendant, and a prejudice suffered by them, which, in our opinion, constituted a good and sufficient consideration for

his promise to purchase the property for the full amount of his judgment, and that no deficiency judgment should be entered against them: See *Montgomery v. Gibbs*, 40 Iowa, 652.

It is also claimed that the complaint was insufficient for the following reasons: (1) Because the effect of the agreement set out was to alter the terms of the note and mortgage, which, under section 1698 of the Civil Code, could only be done by a contract in writing, or by an executed oral agreement; (2) because the direct effect of the agreement was to prevent bidding at the execution sale, and it was therefore against public policy and void. We are unable to see how either of these points can be sustained. The agreement did not in any way alter the terms of the note or mortgage. It simply, as in *Montgomery v. Gibbs*, supra, obligated the defendant to limit his remedy to the property sold. Nor did it prevent bidding at the sale, but only required the defendant to bid for the property the full amount of his judgment.

It is further claimed that the complaint was defective because it contained no allegation that defendant made the agreement with intent to deceive or mislead the plaintiffs, or with any fraudulent intent whatever, but shows that the agreement was made before the foreclosure suit was commenced, and that plaintiffs had an opportunity to appear therein, and neglected to do so, and that they lost their rights, if any they had, under the agreement, by reason of their own negligence. We do not perceive that it can make any difference whether the agreement was made before or after the suit was commenced. It was evidently made in view of the suit, and its purpose was to save the plaintiffs from the trouble and expense of appearing in the case, and being present and bidding at the sale; and, being made, plaintiffs had a right to rely upon it, and to expect the defendant to carry it out in good faith, and were guilty of no negligence in doing so. If, however, the allegations are true, the defendant's failure to carry it out constituted an actionable fraud or wrong, which entitled the injured parties to relief.

Finally it is claimed that the complaint was insufficient, because it does not appear therefrom that the plaintiffs had any defense to the foreclosure suit, or that they could have prevented the entry of the deficiency judgment, or that the land mortgaged was worth more than the sum for which de-

defendant bid it in, or that plaintiffs could have procured any one to bid more, or that they would have bid more themselves if present at the sale, and hence that there is no showing that plaintiffs had been damaged. The complaint avers that the plaintiffs relied upon the promise and agreement of the defendant, and, so relying and believing that he would keep and perform the same, they "failed to appear or answer" in the foreclosure suit, and that thereafter, so relying and believing in said promise, "they abstained from being present at said sale, or taking any steps whatsoever to obtain a purchaser for said property," and, "furthermore, did, by reason of their reliance upon said promise of defendant, refrain from making or causing to be made any bid at said sale, although at the time they were fully able to purchase said property for the amount of said judgment, and thereby to protect themselves against said judgment." The fair import of this language, it seems to us, is that, but for the agreement of defendant, plaintiffs would have appeared and answered in the suit, and would have been present and bid for the property at the sale, or would have procured someone else to do so. The language, of course, is somewhat ambiguous and uncertain, but, as no demurrer was interposed, that ground of objection was waived. That the plaintiffs were damaged by their failure to appear and answer in the foreclosure suit, and to be present and have an opportunity to bid at the sale, is clearly shown, inferentially at least. After the mortgage was executed, they sold the property, and the grantees assumed the payment of the mortgage debt. As between themselves, the grantees thereupon became the primary debtors, while the mortgagors occupied the relation of sureties, responsible to the mortgagee alone: *Wilts. Mortg. Forec.*, sec. 223. Both the purchasers and the mortgagors were proper parties to the action to foreclose, and the plaintiff therein was entitled to have the deficiency judgment entered against the former: *Pellier v. Gillespie*, 67 Cal. 582, 8 Pac. 185. It would seem, therefore, that the mortgagors would have been entitled, if present, to claim and insist, for their own protection, that such judgment should be entered against the purchasers as well as against themselves. And that the property was worth more than \$4,200, the price bid by defendant, may be assumed from the fact that the plaintiffs were able and willing to purchase the same for the

amount of the judgment. We conclude, therefore, that, in the absence of a special demurrer, the complaint was sufficient, and the objection that it did not state facts sufficient to constitute a cause of action should not have been sustained. The law applicable to the case is very clearly stated by Mr. Freeman in his work on Judgments (section 492, fourth edition), as follows: "It has frequently happened that one of the parties litigant has failed to present his claim or defense because he relied upon some agreement or understanding between himself and his adversary which, if observed, rendered such presentation unnecessary. And with more than occasional frequency, if we may judge from the reports, these agreements have been designed to lull a party into security and inactivity in order that some unconscionable advantage could be taken of him. In all such cases courts of equity, when asked to do so, have invariably restored the injured party to his rights under the agreement, and have wrested from his opponent all those fruits he had hoped to harvest and enjoy through fraud and duplicity. . . . Where A was sued upon a note and mortgage, and the plaintiff, for a valuable consideration, released him from personal liability, but took judgment in violation of his contract, and issued execution thereon, such execution was restrained on the ground 'it was against conscience for the mortgagee to retain his advantage'"; citing *Hibbard v. Eastman*, 47 N. H. 507, 93 Am. Dec. 467. "It makes no difference that the agreement is void because made on Sunday, or was oral, when the rules of the court required all stipulations to be in writing. If it can be shown that it was successfully employed to prevent the defendant from making his defense, then the plaintiff will not be allowed to retain the advantage it has secured him"; citing *Blakesley v. Johnson*, 13 Wis. 530. And see *Thompson v. Laughlin*, 91 Cal. 313, 27 Pac. 752, a case somewhat analogous to this.

The judgment and order appealed from should be reversed and the cause remanded for a new trial.

We concur: Searls, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are reversed and the cause remanded for a new trial.

WOODBRIDGE v. WORLD PUB. CO. et al.

No. 15,923; April 27, 1895.

40 Pac. 231.

Appeal.—A Finding by the Court on Conflicting Evidence will not be disturbed on appeal.

APPEAL from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Alfred F. Woodbridge against the World Publishing Company and others for the subjection of property. From judgment for defendants, plaintiff appeals. Affirmed.

Wm. Grant and C. S. Cushing for appellant; Bartholomew Noyes for respondents.

PER CURIAM.—This action is in the nature of a creditors' bill to subject property in the possession of the defendant California World Publishing Company to the payment of a judgment recovered by the plaintiff against the defendant World Publishing Company. The court below found the facts, and gave judgment against the plaintiff, from which, and from an order denying his motion for a new trial, he appeals. The notice of motion for a new trial stated that the motion would be made upon the grounds of the insufficiency of the evidence to justify the decision, and that it was against the law, and of errors in law occurring at the trial, and excepted to by the plaintiff.

It is earnestly contended that several of the findings were not justified by the evidence, but it would subserve no useful purpose to notice them in detail. It is claimed that every witness in the case, with one exception, was absolutely adverse to the plaintiff, and that he was not bound by the testimony of witnesses adverse to him; and it is said that, while there was some testimony tending to support the findings, still "the whole transaction shows, beyond a doubt, that the facts found cannot be the truth." There is testimony set out in the statement which, in our opinion, tends to support all of the findings. Whether that testimony was true or

false was a question for solution by the trial court, and not on appeal. The case falls within the well-settled rule as to conflicting evidence, and the judgment cannot be disturbed upon the first ground urged.

It is also contended that the court failed to find upon several of the issues raised by the pleadings, and that some of the findings are inconsistent and contradictory. But we think the findings substantially cover all the material issues, and we discover no such inconsistency in them as would justify a reversal.

It does not appear from the record that any rulings of the court during the trial were excepted to by the plaintiff, nor are there any specifications attached to the statement showing errors of that kind. It follows that the judgment and order appealed from must be affirmed, and it is so ordered.

HAINES v. STILWELL.

No. 15,828; April 30, 1895.

40 Pac. 332.

Contract—Modification.—After Defendant had Agreed to Re-pay to plaintiff all moneys received under a contract in consideration of its annulment, a proposition by him to pay a certain amount was accepted by the latter, if he would agree in writing to do so, and defendant promised to send the agreement, but never did so. Held, that the new agreement was never perfected so as to change the defendant's liability under the agreement for the rescission of the contract.

Trial—Findings.—Where Counts for Money Loaned, Money had and received, and on a special contract, which is especially set out, are joined, and the complaint shows that they are all on the same cause of action, the failure to find the issues under the first and second counts is not reversible error, the issues under the third count being found, as the latter include the former.

Pleading—Attacking on Appeal.—The Fact That Defendant's Promise, in the action on a contract, is alleged in the complaint, merely by way of recital, is not ground for reversing a judgment for plaintiff, where the complaint is attacked for the first time on appeal, and where defendant specially denied the promise,

Interest—Rescission of Contract.—Defendant, After Having Agreed, in consideration of the rescission of a contract, to repay plaintiff all moneys received thereunder, refused to do so. Held, that he was liable for interest on the money received from the date of the later agreement.

APPEAL from Superior Court, City and County of San Francisco; Charles W. Slack, Judge.

Action by Byron W. Haines against Henry C. Stilwell. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Pierson & Mitchell for appellant; J. W. Dorsey and Haven & Haven for respondent.

HAYNES, C.—This action was brought by Haines to recover from Stilwell \$6,293.65, with interest. The cause of action was single, but was stated in different forms in the complaint: First, for money loaned; second, for money had and received; and the third count set out a contract in writing made March 30, 1891, whereby defendant agreed to sell and plaintiff agreed to buy one-half of the capital stock of the Stoney Creek Improvement Company, a corporation, defendant then being the owner of all the stock of said corporation. Certain payments were made thereon by plaintiff, the particulars of which need not be stated in this connection. The stock was not to be delivered until fully paid for, and none of it was delivered. On or about August 12, 1891, the parties thereto, under date of April 15, 1891, indorsed upon said contract the following: "We do hereby mutually agree that this contract is and shall be null and void"—and signed their names thereto; and it was alleged that defendant promised and agreed to repay to the plaintiff all moneys he had paid or advanced under said contract. The issues raised by defendant's answer were tried by the court without a jury, and findings and judgment were for the plaintiff for \$4,793.65, with interest thereon from August 12, 1891. Defendant's motion for a new trial was denied, and this appeal is from the judgment and the order denying a new trial. Appellant specifies findings 1, 3, 5, 6, and 8 as not justified by the evidence.

1. The court found that plaintiff paid under the contract \$4,793.65, and appellant contends that the evidence is in-

sufficient to sustain a finding for more than \$2,789.15. A careful examination of the evidence reveals no ground upon which this finding should be disturbed. The principal point of difficulty in the mind of appellant seems to be based upon the "Nager Mill" sale, as to which the plaintiff claimed that defendant guaranteed he would sell it for a specified sum, which was larger than defendant received for it. But the court clearly found against plaintiff's contention that defendant guaranteed to sell the mill for \$8,000, and must have found that defendant sold it for \$6,500—\$2,200 in cash and \$4,300 in notes—and credited plaintiff and charged defendant said cash as received under said contract (the notes having been delivered to plaintiff), and this is in exact accord with defendant's testimony as to that transaction.

2. The third finding is to the effect that at the time of the rescission of the contract the defendant promised and agreed to repay to the plaintiff all the moneys he had advanced or paid to the defendant under the contract. There was direct testimony given by the plaintiff sufficient to sustain this finding, and, while there was a conflict of evidence, such conflict principally related to how and when and to what extent the plaintiff should be reimbursed. There seems to have been a proposition made by defendant, after the cancellation of the contract, to pay plaintiff \$3,000 when the property should be sold, and that plaintiff was willing to accept such proposition provided the defendant would agree in writing to do so; that defendant said he would send such agreement to the plaintiff, but never did it; and defendant contends that, as the plaintiff did not allege such agreement or promise in his complaint, he cannot recover upon it in this action. But the plaintiff's recovery is not based upon such promise, but upon the original promise made at the time the contract was rescinded. Of course it was in the power of the parties to change the agreement, but such new agreement was never perfected, the condition imposed by the plaintiff not having been complied with.

3. The fifth finding negatives the claim of the defendant that plaintiff agreed that he should retain to his own use the moneys plaintiff had paid to him, and the sixth is to the effect that plaintiff at no time waived his right to claim a repayment from the defendant. The first and third findings above

noticed being sustained by sufficient evidence, it follows that the fifth and sixth must be also sustained.

4. The eighth finding is that the plaintiff never received any benefit from defendant under the original contract. As to this, appellant says the plaintiff received a benefit, in that he was admitted into the ownership of a half interest in said corporation, and received therewith all its benefits and emoluments. I think the court did not understand the word "benefits" to mean the barren honor of being a stockholder in a corporation burdened with debts and mortgages, and the evidence shows that plaintiff received no income, profits, or other tangible benefit.

5. Appellant further specifies that the issues under the first and second counts were not found upon by the court. These counts were upon the same cause of action as the third, and it so appeared upon the face of the complaint. As they rested upon the same facts, the facts found include them. Were it otherwise, it would not avail the appellant, as his answers to those counts consisted only of conclusions of law, and therefore admitted the facts alleged in them.

6. Appellant further contends that the third count of the complaint does not state facts sufficient to constitute a cause of action. His point is that the promise and agreement to repay the money he had received from the plaintiff is not alleged except by way of recital, as a consideration merely for the cancellation. The count mentioned is clearly open to criticism; but no demurrer was interposed upon the ground that the allegations were uncertain, and the case was tried as though the facts were properly alleged, and without any objection to evidence given under the imperfect averment. That it is too late to raise the question in the appellate court, under such circumstances, see *Horton v. Dominguez*, 68 Cal. 642, 10 Pac. 186; *Kirsch v. Kirsch*, 83 Cal. 633, 23 Pac. 1083; *Ortega v. Cordero*, 88 Cal. 221, 26 Pac. 80. Not only so, but defendant in his answer expressly denied "that he agreed to restore or repay to the plaintiff all or any of the moneys theretofore paid by the plaintiff to defendant under the terms of said contract." If the defendant had not understood the complaint to allege that he had so agreed, the denial would not have been made, and the denial, therefore, admits the existence of the allegation, and aids or cures its defects.

7. It is further contended that the findings do not support the judgment. The only point made is that the court found that the plaintiff had paid under said contract \$4,793.65, while the judgment is for \$5,657.63, the difference between these sums being the interest on the sum first stated from August 12, 1891. The court, however, having found that from the date last stated the defendant had in his hands \$4,793.65 belonging to the plaintiff, as a conclusion of law rightly found that he was entitled to interest thereon, and ordered judgment accordingly. The judgment and order appealed from should be affirmed.

We concur: Vancief, C.; Britt, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

BANCROFT v. BANCROFT.*

No. 15,848; May 8, 1895.

40 Pac. 488.

Contracts—Menace.—A Contract for Sale of Stock, which plaintiff owned and had pledged to a bank, was not obtained by "menace," within the definition of Civil Code, section 1570, "a threat of injury to the character," where defendant said that he would inform the bank that plaintiff was not the owner of the stock if plaintiff did not make the contract.

Contract—Undue Influence.—Nor can the Contract be Said to have Been obtained by undue influence, plaintiff being a mature man, in the possession of all his faculties, who for several years had been manager of the corporation in which were the shares, though defendant, who was the owner of the majority of the corporation's stock, and plaintiff's uncle, had been accustomed in a great measure to direct plaintiff's action, and was a tyrannical and overbearing man.

APPEAL from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by W. B. Bancroft against H. H. Bancroft for damages for inducing plaintiff to make a contract. A de-

*For subsequent opinion in bank, see 110 Cal. 374, 42 Pac. 896.

murrer was sustained to the complaint, and plaintiff appeals. Affirmed.

Mastick, Belcher & Mastick for appellant; E. J. McCutchen for respondent.

McFARLAND, J.—A demurrer to the amended complaint was sustained, and, plaintiff declining to further amend, judgment was rendered for defendant, from which plaintiff appeals. The complaint is substantially as follows: Defendant is the uncle of plaintiff, and ever since the latter's boyhood plaintiff was under the control and direction of defendant, and in his employ, and a part of the time resided with him. Defendant was accustomed in a great measure to guide and direct plaintiff's actions in business and other matters; was tyrannical and overbearing, and impatient of opposition; and thus had retained great influence over plaintiff, who was accustomed to rely upon and be guided by defendant in matters of business. Defendant owned much more than a majority of the stock of a certain corporation called the Bancroft Company, and entirely controlled and managed its affairs. Defendant was the president of said corporation, and plaintiff was employed as the manager of its business. In September, 1887, plaintiff became the owner of thirteen hundred and forty-five shares of the stock of said corporation, and continued to own the same until the thirteenth day of February, 1891. In November, 1890, plaintiff borrowed \$3,500 from the People's Home Savings Bank, and as security therefor pledged to said bank said thirteen hundred and forty-five shares of stock. On February 12, 1891, defendant demanded of plaintiff that plaintiff should transfer and deliver to defendant the said thirteen hundred and forty-five shares of stock, and all his interest in the assets and property of said corporation, for the sum of \$5,000, and then and there "informed plaintiff that unless he should forthwith transfer to him (defendant) the said stock and property on the terms aforesaid, he (defendant) would inform the said bank that plaintiff was not the owner of said stock, or any part thereof, and that plaintiff had pledged said stock without right or authority." He also said that he (defendant) would not pay more than \$2,000 of said indebtedness of plaintiff to said bank, and would levy assessments on the

stock of said corporation to the extent of closing out its business. "Thereupon plaintiff, solely through the influence possessed over him by defendant, and his habitual fear of defendant, and terrified by the threats aforesaid, and fully believing that defendant would carry said threats into execution, and would make to said bank and to others the statements so threatened, and that by reason of such statements plaintiff's character and reputation would be blasted and destroyed in the community in which he was residing and doing business, on the thirteenth day of February, 1891, acceded to said demand." Thereupon defendant directed plaintiff to deliver said stock to the said Bancroft Company, and to give to said company a bill of sale of all his interest in the property of said corporation, which plaintiff did on said day, "solely for the reasons aforesaid." The said company paid said indebtedness to said bank, and paid the balance of the \$5,000 to plaintiff. It is averred that "plaintiff's consent to so transfer and deliver said stock to said corporation and to execute the bill of sale aforesaid was not freely given, but was obtained solely by the means aforesaid, and in consequence of the menace and the undue influence so exercised by defendant as aforesaid." Also, "that, as plaintiff is informed and believes, the value of said 1,345 shares of stock on the said 13th day of February, 1891, was the sum of fifty thousand dollars, as was then well known to defendant, and plaintiff has been damaged by the wrongful acts of defendant as aforesaid in the sum of forty-five thousand dollars." It is also averred, upon information and belief, that after said transaction defendant so mismanaged the affairs of said corporation that "the said shares of stock became and were at the commencement of this action greatly depreciated, and of little or no value." The prayer is for "judgment against defendant for the sum of forty-five thousand dollars and for costs of suit." It does not appear when the action was commenced, but the present complaint was filed November 6, 1893, nineteen months after the alleged cause of action accrued.

The foregoing are the material averments of the complaint somewhat condensed. The demurrer was both general and special, and we think that it was properly sustained for a want of a statement of sufficient facts to constitute a cause

of action. The theory of the complaint is that plaintiff's consent to the said sale of the stock was not "free." The code provides that "an apparent consent is not real or free when obtained through (1) duress; (2) menace; (3) fraud; (4) undue influence; or (5) mistake": Civ. Code, sec. 1567. The averments of the complaint certainly do not show duress, fraud, or mistake. It is contended that they show "menace," because they show a threat of "injury to the character," under section 1570 of the Civil Code. The averment on this point is that defendant said he "would inform the bank that plaintiff was not the owner of said stock." But plaintiff, as the complaint shows, was the owner of the stock; and, this being so, it is impossible to conceive that a mere idle threat of defendant to say that plaintiff was not the owner was such an attack on his character as to overcome his free will. In an opinion delivered by the learned judge of the court below when sustaining the demurrer he says that the complaint does not show any ground for avoiding the sale through want of the free consent of plaintiff, unless that ground be undue influence; and that in such a case the remedy is rescission. Section 1566 of the Civil Code provides that "a consent which is not free is nevertheless not absolutely void, but may be rescinded by the parties in the manner prescribed by the chapter on rescission." Defendant contends that the remedy of rescission is only cumulative, and that in such a case a party, without rescinding, may maintain an action for damages under the general provision of section 3281. Nevertheless no case has been found, and counsel seem to admit that no case can be found, where a general action for damages has been maintained upon the ground of undue influence in procuring a contract. If such an action can be maintained, then the principle that a party must rescind promptly can be avoided. But we need not determine this point definitely, because in our opinion the facts averred do not make a case for either rescission or damages on the ground of undue influence. The complaint does not attribute to plaintiff either infancy or idiocy or any mental or moral imbecility. He was a mature man, in the possession of all his faculties, and for several years before the transaction complained of had been the general business manager of the Bancroft Company, with full and special opportunity to know its affairs and condition. And it is impossible to contemplate that under these circum-

stances he was induced by any facts, which he avers as constituting undue influence, to sell for \$5,000 property which was worth \$50,000. The judgment is affirmed.

We concur: Henshaw, J.; Temple, J.

CUNNINGHAM et al. v. NORTON.

No. 15,764; May 23, 1895.

40 Pac. 491.

Guaranty—Consideration.—In an Action by an Assignee on a Guaranty executed to plaintiff's husband for rent under a lease of his property making rents payable to her, plaintiff and her husband testified that the guaranty, the date of which was blank, was executed before the delivery of the lease, and as part of the same transaction. The guarantor admitted that when he signed the guaranty he did not know whether the lease had been delivered, or whether the lessee was in possession of the premises. Held, that the guaranty was good under Civil Code, section 2792, providing that, where an original obligation is entered into in consideration of a guaranty, no other consideration is necessary for the guaranty.

Guaranty.—An Objection of No Consideration for a guaranty cannot be made where the complaint thereon alleges that it was made for a good consideration, and this is not denied in the answer.

Guaranty.—No Notice of the Assignment of a Guaranty for rent is necessary before suit by the assignee, where the guarantor has not made any payment of rent to the assignor.¹

Guaranty—Assignment.—The Assent of the Guarantor to the assignment of a guaranty for rent is not necessary.

Guaranty to Pay Rent.—In an Action on a Guaranty to pay rent "which remains due and unpaid," it is immaterial whether the lessee could have paid the rent or not.

APPEAL from Superior Court, San Mateo County; George H. Buck, Judge.

¹ Cited in *Reios v. Mardis*, 18 Cal. App. 280, 122 Pac. 1091, as authority for the rule that the assignee of a contract of guaranty may sue in his own name.

Action by Richard Cunningham, administrator, and another, against W. H. Norton, as guarantor, for rent. From a judgment for plaintiffs, defendant appeals. Affirmed.

John M. Lucas for appellant; Edw. F. Fitzpatrick for respondents.

HAYNES, C.—Richard Cunningham was the owner of certain premises known as the "San Bruno Hotel," and leased the same to M. J. McBride, the rent to be paid to his wife, Mary Cunningham, since deceased. Norton, the appellant here, executed a written guaranty that he would pay to Richard Cunningham all rents that might remain due and unpaid, "according to the terms of the written lease of the San Bruno Hotel"; and this action is upon said guaranty, to recover the sum of \$550, which the lessee had failed to pay. The complaint alleged that the guaranty was executed and delivered at the time the lease was delivered, and in consideration of the delivery of the lease, as well as for other good and valuable consideration, and that, prior to the commencement of the action, Richard Cunningham, to whom the guaranty was executed, assigned to Mary Cunningham, for a good consideration, said demand and cause of action. The answer denied these allegations, and denied "that there is due from defendant" said or any sum whatever. No other allegations were put in issue by the answer. The cause was tried without a jury, and findings and judgment went for plaintiffs, and this appeal is from the judgment and order denying defendant's motion for a new trial.

Some exceptions were taken to evidence, but, as none of them are specified as error, they cannot be noticed.

It is specified that there was no evidence showing that there was any consideration to support the guaranty. Appellant does not discuss the evidence. He seems to rely upon the claim or assertion that the guaranty was not executed or entered into at the same time the lease was executed. The date of the guaranty was left blank, but Mrs. Cunningham, who was then in life, testified that she was present when the guaranty was signed by defendant; that the lease had not been delivered; that she would not give the lease until he signed the guaranty; and that the whole transaction was done at the same time and place. The defendant testified that Mo-

Bride, the lessee, was his son in law; that he went to the office when the paper was executed, at McBride's request, to become security for him upon the lease, and that he did it to help him, and that he did not know whether the lease had been delivered at that time, or not; and that McBride was then in possession of the leased premises. Upon cross-examination he admitted that he did not know whether McBride was in possession, or not, but supposed he was, while Richard Cunningham testified positively that the lease was not delivered, nor McBride let into possession, until after the guaranty was executed by defendant. The guaranty was therefore good, under section 2792 of the Civil Code.

Appellant also contends that the assignment of the cause of action arising upon the guaranty could not be made without an expressed consideration. The complaint, however, alleged that it was made for a good consideration, and this was not denied in the answer. No notice of the assignment was necessary before suit. The defendant not having made any payment to the assignor, he was not prejudiced. It is immaterial whether McBride could have paid the rent or not. It is conceded that he had not paid it. The fact that he had not was not denied in the answer. The guaranty was not that the lessee was good or solvent, or that the rent was collectible from the lessee, but that he would pay if the lessee did not. The consent of the guarantor to the assignment was not necessary, nor were the rights of the guarantor against McBride affected thereby.

I find no contradiction or inconsistency in the findings, and none are pointed out by counsel. The findings are clearly justified by the evidence, they are not against law, and the court did not err in ordering judgment for the plaintiff. The judgment and order appealed from should be affirmed.

We concur: Belcher, C.; Vancielief, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

GRIMES v. LINSKOTT et al.

No. 15,780; May 24, 1895.

40 Pac. 421.

Injunction.—A Bill to Restrain Public Officers from Filling up a ditch along the side of a road, which fails to show whether the road is public or private, whether the ditch or watercourse is artificial or natural, or occupied a part of the road or was outside of it, is insufficient.

APPEAL from Superior Court, Santa Cruz County; J. H. Logan, Judge.

Action by Michael Grimes against James A. Linscott and others for an injunction. From a judgment for defendants, plaintiff appeals. Affirmed.

Julius Lee for appellant; Carl E. Lindsey for respondents.

BELCHER, C.—This action was brought to obtain an injunction restraining the defendants, who were the supervisors of Santa Cruz county, from filling up, or causing to be filled up, a ditch or watercourse along the side of the Carlton road, in that county. It is alleged in the complaint that the plaintiff is the owner of a tract of land bounded on the northeasterly side by the "Carlton Road," so called, and that along the southerly side of a portion of said road, which bounds plaintiff's land, there is, and has been for more than twenty years, a ditch or watercourse, through which a stream of water has been accustomed to flow in an easterly direction to a natural stream called the "Casserly creek," and thence down said creek to the Pajaro river; that the defendants, acting as the board of supervisors for said county, at their regular meeting on the seventh day of June, 1893, passed and caused to be entered in their minutes an order that said ditch or watercourse be filled up to a level with the roadbed of said road, so as to completely stop and prevent the water from flowing therein and passing off as it had been accustomed to do, and that defendants, unless restrained from so doing, will proceed to fill up said ditch or watercourse, pursuant to said order; that the necessary and inevitable consequence and

effect of such filling up will and must be to cause the water which otherwise would flow in said ditch or watercourse to be diverted to and upon the lands of plaintiff, and to overflow, spread out and stand upon the same, which, but for such filling up, it would not do, to his great, constant, continuing, increasing, and irreparable damage and injury; and that the sole and only purpose and object of said defendants in so filling up said ditch or watercourse is, confessedly, to divert the waters therefrom, and to cause them to flow upon plaintiff's land, and not because such filling up is necessary, or deemed to be necessary, for the proper protection or repairing of said road. A general and special demurrer to the complaint was interposed and sustained. Plaintiff declined to amend, and thereupon judgment was entered that he take nothing by his action, from which he appeals.

The only question is as to the sufficiency of the complaint. We think the demurrer was properly sustained upon the ground of ambiguity and uncertainty. Assuming that the complaint was sufficient in other respects, still it cannot be ascertained therefrom whether the Carlton road was a public or private road, nor whether the ditch or watercourse was an artificial or natural watercourse, nor whether it occupied a part of the road or was outside of its limits. But pleadings are to be construed most strongly against the pleader, and, so construing the complaint, it must be held that the road was a public highway, and the ditch was an artificial watercourse, constructed upon and within the limits of the road. If such were the facts, the plaintiff had acquired and could acquire no right by prescription to have the ditch maintained, and the defendants, as the board of supervisors, had a right to order it filled up, and to cause the work ordered to be done. The reasons which prompted such action cannot be inquired into in this proceeding. The judgment should be affirmed.

We concur: Vanciel, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

FIRST NAT. BANK OF SOUTH BEND v. KELSO.

No. 15,816; May 25, 1895.

40 Pac. 427.

Appeal.—An Assignment of Error, on Motion for a New Trial, that the “evidence is insufficient to justify the third finding of fact, in that there is no evidence to show that there is due and owing plaintiff” a certain sum, is insufficient to question on appeal the sufficiency of the evidence to sustain such finding that no part of the principal has been paid except a certain sum.

APPEAL from Superior Court, City and County of San Francisco; A. A. Sanderson, Judge.

Action by the First National Bank of South Bend against John Kelso. There was a judgment for plaintiff, and, on defendant's motion for a new trial being denied, he appeals. Affirmed.

Edward L. Foster for appellant; Reel B. Perry for respondent.

PER CURIAM.—Action on a promissory note for the sum of \$2,000, besides interest, dated April 1, 1893, payable three months after date, executed by appellant in favor of the respondent. The complaint was filed October 12, 1893, and contained, among other allegations, an averment to the effect that no part of the principal sum or the interest mentioned in the note had been paid. This allegation was denied in the answer, and the defendant also pleaded that the time of payment had been extended by written agreement of the parties. It appears from the bill of exceptions that the controverted fact at the trial was whether the plaintiff had given to the defendant the extension of time pleaded by him in his answer. The court found in favor of the plaintiff, and rendered judgment in his favor. The defendant moved for a new trial, which was denied, and he has appealed.

One of the grounds urged in the motion for a new trial is the insufficiency of evidence to sustain the decision of the court, and the specification of this insufficiency is as follows: “The evidence is insufficient to justify the third finding of

fact, in that there is not sufficient evidence to show that there is due and owing plaintiff from defendant the sum of \$2,000, together with interest thereon from July 1, 1893, at the rate of ten per cent per annum." The third finding of fact is as follows: "That no part of the principal sum of said note, or of the interest thereon, has ever been paid, save and except the sum of fifty dollars on account of interest; and that there is due and owing plaintiff from defendant the sum of \$2,000, together with interest thereon from July 1, 1893, at the rate of ten per cent per annum." Upon the appeal herein counsel for the appellant makes no other contention than that there was no evidence in support of the finding of the court that the note had not been paid. The appellant did not, however, in the bill of exceptions, specify this as one of the particulars in which the evidence was insufficient to justify the decision, and for that reason he cannot now be heard in support of his contention. The assignment of error is limited to the latter part of the third finding, and does not question that portion thereof which finds, "that no part of the principal sum of said note, or of the interest thereon, has ever been paid, save and except the sum of fifty dollars on account of interest." The judgment and order are affirmed.

SPENCER v. DUNCAN.*

No. 15,700; June 4, 1895.

40 Pac. 548.

Limitation of Actions—Denial of Trust—Sufficiency.—Where, in an action to compel defendant to account for money belonging to plaintiff, placed in his hands, and invested by him in a lot without authority, the evidence was that, when plaintiff went to defendant for a settlement, he began to talk about the lot, but, on plaintiff telling him she did not come to talk about the lot, but for a settlement, defendant began to talk about the imprisonment of his brother, whereupon plaintiff left his office, there was not shown a sufficient denial of the trust by defendant to put in operation the statute of limitations against plaintiff's claim.

*See 107 Cal. 423, 40 Pac. 549.

APPEAL from Superior Court, City and County of San Francisco; William T. Wallace, Judge.

Action by John C. Spencer, administrator of Rebecca Spencer, deceased, against William L. Duncan, to compel defendant to account for money held by him in trust for decedent. Judgment was rendered for plaintiff, and from an order denying a motion for a new trial defendant appeals. Affirmed.

W. C. Burnett and Estee & Miller for appellant; Geo. M. Spencer and Bull & Cleary for respondent.

SEARLS, C.—This is an action to compel the defendant to account for and pay to plaintiff funds alleged to be held by him in trust for the plaintiff, Rebecca Spencer, who departed this life during the pendency of the action, whereupon John C. Spencer, administrator of her estate, was substituted as plaintiff herein. Plaintiff had judgment for \$1,071.85 and interest from May 1, 1870, amounting in the aggregate to \$2,678.73 and costs. This appeal is from an order denying defendant's motion for a new trial. There is a separate appeal in the same case from the final judgment. The theory of Rebecca Spencer, the then plaintiff in the case, as delineated by testimony at the trial, was: That she was a school teacher at Calistoga, of the age of sixty-nine years. About March 24, 1869, she had \$2,200 in the Bank of California, which she drew with a view of taking it with her the next morning to Napa county, where she expected to loan it temporarily. Being dissuaded from carrying so much money with her, she went in the evening to the home of Dr. Lucky, an old friend, and also a teacher; and, the doctor being absent, she left \$2,160 of the money with his wife, to be by the doctor deposited in a savings bank, and the certificate to be sent to her at Calistoga, where she went early next morning. On or about April 20, 1869, she received a letter from Dr. Lucky, dated April 1, 1869, in which he informed her he had placed her money in the hands of William L. Duncan (his son in law), who would dispose of it so as to secure her one and one-fourth per cent per month interest, and that the latter recommended her to purchase an interest in a home-stead company, of which his brother, J. C. Duncan, was secretary, and recommended the purchase. The letter indicates

that Duncan had already purchased the interest for her, and inclosed circulars, etc. By advice of friends, Miss Spencer came to San Francisco, interviewed Lucky, who extolled the investment as a fine one, etc., but she declined it, and told him all she wanted was her money. She interviewed Duncan about the first of 1870, told him she wanted no investment, but did want her money. About March, 1870, Miss Spencer received \$1,088 of the money from Duncan, and he then agreed, according to her testimony, to hold the residue of the fund in trust for her, which she informed him she might want any day. This outline of plaintiff's testimony must serve in place of a fuller statement to convey an idea of the origin and condition of affairs between the parties.

The theory of defendant, Duncan, was that Dr. Lucky came to him, and said a friend of his wife had some money which she wished to invest, and would like to invest a part of it in a lot in this city; that he took the money, gave a demand note for the amount (\$2,160), with interest at one and one-fourth per cent per month; bought a share in a homestead corporation, which, upon certain payments being made, called for a lot; that he made such payments from the funds in his hands, received a certificate for the lot, and delivered it to plaintiff with the residue of the money in his hands, etc., to all of which the said Rebecca Spencer assented. These were the theories around which the testimony clustered, and in support of which a number of witnesses testified. That there was a sharp conflict in the testimony, that some of the witnesses were either very forgetful or untruthful, is quite apparent from the record. The court below evidently believed that there was a deliberate attempt on the part of defendant and his family friends to absorb the funds of the plaintiff, and to foist upon her property in lieu thereof which she had not authorized them to purchase for her, and which she did not want; and that, relying on her inexperience, they wove around her a train of circumstances tending to render their course plausible, while on close scrutiny the fraudulent conduct of defendant in the premises was apparent. We say this must have been substantially the conclusion to which the court below arrived, and, without stopping to analyze the testimony, and showing therefrom the suspicious circumstances pointing with more or less directness to the result reached by the court, it is sufficient to say here that there is sufficient testimony to

uphold the findings of the court if it believed the statements of plaintiff's witnesses rather than those of the defendant in conflict therewith.

Upon the question of the claim of plaintiff being barred by the statute of limitations there was also a substantial conflict in the evidence. It is well settled that in cases of trust the statute does not begin to run until the trustee, by word or act, denies the trust, and the beneficiary has notice of such denial. On the twenty-third day of October, 1888, defendant, in a letter to one Knox, an attorney, who had made a demand upon him, repudiated and denied the trust. This action was brought within two years next thereafter, viz., January 14, 1890. Plaintiff says that she called upon defendant for a settlement in 1874, and that defendant began to talk about the lot, to which she replied that she did not come to talk about the lot, but a settlement, and that defendant then spoke of his brother (J. C. Duncan) being in prison, "and seemed very much overcome, and I walked out of the office." She further adds that "he did not refuse to give me my money, but he turned the conversation by talking about his brother." Defendant testified that the money was demanded from him as early as 1874. If he was to be believed, the action is barred. The court below evidently disbelieved him. This being so, the court, under the previous rulings of this court, was justified in finding that the demand was not barred by the statute of limitations: *Schroeder v. Jahns*, 27 Cal. 274; *Zuck v. Culp*, 59 Cal. 143; *Broder v. Conklin*, 77 Cal. 331, 19 Pac. 513; *Wood, Lim.*, sec. 413. The findings support the judgment, and the order appealed from should be affirmed.

We concur: Britt, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order appealed from is affirmed.

CHRISTENSEN v. JESSEN.

No. 15,442; June 4, 1895.

40 Pac. 747.

Pleading—Defects.—Judgment will not be Reversed because of a defective allegation which did not mislead the opposite party, and which was not objected to by demurrer, and under which evidence was admitted without objection.

Limitation of Actions—Fraud or Mistake.—Code of Civil Procedure, section 338, subdivision 4, limiting to three years "an action for relief on the ground of fraud or mistake," applies to an action at law, as well as in equity.¹

Assignment of Lease—Fraud in Procuring—Evidence.—Defendant having induced plaintiff to consent to an assignment of a lease by representations that the assignment provided for an annual rent of \$800 to be paid plaintiff, it is unnecessary, in an action for fraudulent representations, that plaintiff prove that \$800 could have been obtained, but if no more than \$500, the amount actually provided for in the assignment, could have been obtained, this was a matter of defense.

APPEAL from Superior Court, Alameda County; F. W. Henshaw, Judge.

Action by Anna Christensen, as executrix of P. J. Christensen, against H. P. Jessen. Judgment for plaintiff. Defendant appeals. Affirmed.

John J. Roche for appellant; Joseph Hutchinson for respondent.

¹ Cited and approved in *Lightner Mining Co. v. Lane*, 161 Cal. 702, 120 Pac. 777, holding that subdivision 4 of section 338, Code of Civil Procedure, covers the case of the owners of contiguous mines, where one has been secretly removing and appropriating ore from the mine of the other.

Cited and followed in *Lightner Mining Co. v. Lane*, 161 Cal. 699, 120 Pac. 775, as being within the rule laid down by Justice Field in the early case of *Kane v. Cook*, 8 Cal. 449, "that in all cases a fraudulent concealment of fact, upon the existence of which the cause of action accrues, is a good answer to the plea of the statute of limitations."

Cited and followed in *Lightner Mining Co. v. Lane*, 161 Cal. 689, 120 Pac. 777, where it was held that an action for ore extracted from the plaintiff's mine would not accrue until the discovery of the fraudulent taking of the ore.

HAYNES, C.—This action was commenced August 29, 1891, by Peter J. Christensen against H. P. Jessen, to recover damages alleged to have been sustained by the plaintiff by reason of fraudulent misrepresentations made to him by defendant. All the issues, except that arising upon defendant's plea of the statute of limitations, were submitted to a jury, which found a verdict in favor of the plaintiff for \$2,000 damages; and, the court having found for the plaintiff upon the plea of the statute of limitations, judgment was entered upon the verdict, and defendant appeals therefrom, and from an order denying his motion for a new trial. Appellant concedes that the evidence was conflicting, and that the verdict of the jury upon the facts must be accepted, leaving only questions of law to be considered. Peter J. Christensen died since the trial, and his executrix has been duly substituted; but, for convenience, he will be referred to as plaintiff and respondent in this opinion, as though still in life.

Plaintiff was the owner of a salt claim in Alameda county. In October, 1883, he executed to defendant a lease of the same for the term of five years, commencing January 1, 1884, at an annual rent of \$500, with the privilege of a renewal for five years more on the same terms; but the lease prohibited the defendant from letting or underletting the whole or any part of the premises without the written consent of the plaintiff. The defendant also owned a salt claim adjoining that of plaintiff, and was the lessee of another claim owned by Peter Mattison. In the early part of 1887 the Union Pacific Salt Company, the American Salt Company, B. F. Barton, E. M. Block, John A. Plummer and Charles A. Plummer formed a combination or company for the purpose of controlling all the salt claims in that locality, and, among them, those controlled by defendant. The combination made defendant a satisfactory offer for his own and the Mattison claim, but that offer was conditioned upon securing plaintiff's claim also, to accomplish which plaintiff's written consent was necessary, and the company also desired to have the option of a second renewal of the lease from plaintiff for the term of five years. On March 10, 1887, the defendant called on plaintiff, and informed him that the company wanted to secure his (plaintiff's) salt claim, but that he (defendant) had no right to lease it. There was then about two years of the original term of five years of defendant's lease unexpired, and plaintiff said,

"If the company takes it, I want \$800, and you can have the benefit of the two years," to which the defendant replied, "All right." Defendant then called on Mr. Plummer, a member of the company, and informed him of plaintiff's terms, and he said he would present it to the other parties. Defendant, however, did not wait to know whether the terms proposed would be accepted, but went to San Francisco, where his lease was, and had the following consent indorsed upon it: "I hereby consent that said Hans P. Jessen may underlet or assign this lease to the Union Pacific Salt Co., American Salt Co., B. F. Barton, E. M. Block, John A. Plummer, and Charles A. Plummer. It is further agreed that said Jessen, or his assigns, shall have the privilege of renewing this lease at the expiration of the first renewal thereof. If such first renewal should be made, the second renewal to be for the term ending on the 18th day of March, 1897." The defendant, on his way to Oakland, read the indorsement, and, as he testified, concluded plaintiff "would not stand that," and called upon an attorney in Oakland, and had the following added to the indorsement above quoted: "The annual rent for the term commencing at the second renewal to be eight hundred dollars." The defendant took the lease, with the said indorsement of consent upon it, to the plaintiff, who tried to read it, but was unable to do so, so as to understand it, whereupon the defendant read it to him, and plaintiff asked, "After the two years, then, I can go and collect my \$800 from the company?" and defendant replied, "Yes, that is what it says," and plaintiff signed it. Under the instructions of the court, to which no exceptions were taken, the verdict of the jury is conclusive as to the relations of these parties, and the right of the plaintiff to rely upon the representations made to him by defendant, and hence the evidence upon that point need not be stated. For the two years remaining of the original term, defendant collected the rent, and paid plaintiff annually \$500; plaintiff supposing that defendant received \$800, and retained \$300, according to the said proposition. In January, 1889, the original term having expired, and the first renewal begun, defendant told plaintiff he could go and collect his rent from the company, and then further told him: "There is a misunderstanding in the lease. It only says \$500." Plaintiff asked whether he had not collected \$800, and he said, "No, I let him have mine for the same I had it,"

and added: "I think you will get your \$800 from Barton, he and his clerk read the lease over several times, and they understand it the same way; and I think, if they pay you once, they will keep on paying you." On applying for his rent the company gave him a check for \$800, but on May 23d he received a letter from the company informing him that they had overpaid him \$300; that until January, 1894, the rent would be \$500, and after that date \$800. Plaintiff then saw the defendant, who claimed that "Plummer done it," and, relying upon his representation that it was a "mistake," commenced an action to reform the indorsement upon that ground. That cause came on for trial on August 19, 1891; and Jessen, being called as a witness by the plaintiff, then first disclosed the manner in which said indorsement was prepared, as hereinbefore recited. Plaintiff was thereupon nonsuited in that action, and ten days later commenced this action to recover damages for the fraud.

Appellant contends that his demurrer to the complaint should have been sustained. The grounds alleged were that facts sufficient to constitute a cause of action were not stated, and that the cause of action was barred by the statute of limitations, specifying subdivision 4, section 338, and subdivision 1, section 339, of the Code of Civil Procedure. He insists that the complaint is fatally defective in not negating a discovery of the facts constituting the fraud more than three years before commencing the action. The averments of the complaint objected to are as follows: "That plaintiff did not discover the said fraud perpetrated upon him by defendant until, to wit, on or about the 18th day of August, 1891; that, long prior to the last-named date, plaintiff discovered the true effect and meaning of said indorsement, but, until the last-named date, supposed the same to have been the result of mistake." Plaintiff's allegation above quoted is not as full and specific as it should have been, but no objection upon that ground was taken by demurrer, nor was any objection made to the admission of evidence upon the ground that said allegation was insufficient, or in any respect uncertain or defective. The evidence being sufficient, and having been received without objection, the judgment should not be reversed because of a defective allegation which did not mislead the defendant, and which was treated upon the trial as sufficient. This rule is constantly adhered to in this court, and is applied

to cases of this character, as well as to others: See *Sukeforth v. Lord*, 87 Cal. 399, 25 Pac. 497, and cases there cited.

The answer of defendant contained pleas of the statutes of limitation, which, upon the trial, were submitted to the court, and found in favor of the plaintiff; and in so finding, it is contended, the court erred. It is argued that plaintiff's cause of action falls under subdivision 1 of section 339, Code of Civil Procedure, which limits an action upon a contract, obligation, or liability not founded upon an instrument of writing to two years, and that it does not fall under subdivision 4 of section 338, limiting actions to three years, which subdivision is as follows: "(4) An Action for Relief on the Ground of Fraud or Mistake. The cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." His argument is that the "relief" to which reference is made in the section last above cited is "equitable relief," and that this is an action at law for damages, and, in support of that proposition, cites *Piller v. Railroad Co.*, 52 Cal. 42. That was an action against a railroad company for personal injuries received in a collision. The statement there made was that "the first clause of subdivision 1 of section 339 is applicable to all actions at law, not specifically mentioned in other portions of the statute. We say actions at law advisedly, since section 343 fixes the time within which certain bills in equity may be filed." Counsel's argument concedes that an action at law will lie for fraud, and, if so, it is one of these cases "specifically mentioned in other portions of the statute." The section of the code in question applies to any and all actions permitted by the code for the purpose of obtaining relief upon the ground of fraud or mistake, whether such action be legal or equitable. The code expressly uses the word "relief" to designate the object of all civil actions. Section 426 of the Code of Civil Procedure provides: "The complaint must contain: . . . (3) A demand of the relief which the plaintiff claims. If the recovery of money or damages be demanded, the amount thereof must be stated." Appellant further distinguishes between "knowledge of the fraud," and "knowledge of the facts constituting the fraud," and insists that plaintiff had such knowledge of the facts as charged him with a knowledge of the fraud more than three

years before the commencement of the action. The fact that a fraud was perpetrated on the plaintiff by the defendant in March, 1887, is not controverted on this appeal, the jury having so found upon conflicting testimony. It is clear, then, that the knowledge of the facts constituting the fraud came to the plaintiff after the date of the transaction of March 12, 1887; and we see nothing in the evidence which tended to call plaintiff's attention to the transaction, or to disclose the fraud, or to put him upon inquiry, until January, 1889, when defendant told him he could go and get his rent from the company, adding that there was "a misunderstanding in the lease," but he thought they would pay him his \$800. It will be remembered that plaintiff's proposition was that he would consent to the subletting if the company would pay \$800 per annum, the defendant to have the benefit of the \$300 increase of rent for the two years the lease had to run before the first renewal, and that the defendant collected the rent and paid the plaintiff his \$500 per annum until January, 1889, which was the beginning of the first renewal, and the beginning of the increased rent to the plaintiff, when he was told there was a mistake, that "Plummer did it." He was paid \$800, however, and was not informed by the company until May, 1889, that he was overpaid. His discovery of the fact that the lease did not provide for an increase of rent was not made before January, 1889, and this action was commenced in August, 1891, and it was not until ten days before the commencement of this action that he learned that, instead of a mistake made by Plummer, it was a fraud perpetrated by the defendant. But if it be conceded that he was put upon inquiry, and should have discovered the facts constituting the fraud in January or May, 1889, this action was commenced less than three years thereafter, and was not barred by the statute. Appellant's contention that, if defendant misread the indorsement to plaintiff, the latter was negligent in not reading it himself, or procuring someone else to read it, is not an open question here, either upon the law or the facts.

It is not necessary to determine whether the court erred in permitting the plaintiff to testify as to the rental paid by the company for other salt claims in the same neighborhood, and the quantity of salt produced by each; for, if it be conceded that defendant's objection should have been sustained, the judgment should not be reversed upon that ground, since the

only object of the testimony was to show that the company would have paid the increased rent, and John A. Plummer, one of the assignees of the lease, and one of defendant's witnesses, testified upon cross-examination that he would have consented to pay \$800, "but it was a matter of indifference." Not only so, but plaintiff's consent to the assignment of the lease having been obtained by defendant upon the representation that the company had agreed to pay \$800 per annum, the allegation of value in the complaint was unnecessary; and if, as a matter of fact, no more than the original rent of \$500 could have been obtained, it was matter of defense to be alleged and proved by the defendant, if, indeed, he were not estopped by his representation from making such allegation and proof. The judgment and order appealed from should be affirmed.

We concur: Belcher, C.; Britt, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

SOUTHERN PAC. R. CO. v. ALLEN.*

No. 15,714; June 6, 1895.

40 Pac. 752.

Contract to Convey Land to Which Patent not Yet Obtained.—

A contract for the conveyance of land within a certain time, if the vendor within that time obtain title thereto by patent from the government, for an agreed price—money paid on the purchase price to be repaid to the vendee, without interest, if the vendor fail to obtain a patent—is not void for lack of mutuality or consideration.

Contract to Convey Land to Which Patent not Yet Obtained.—

Plaintiff agreed to convey to defendant certain lands, within five years, if he obtained, within that time, title by patent from the government, for one-fifth cash, and the balance secured by mortgage, with interest. If plaintiff failed to obtain title, he was to repay the money paid by defendant, without interest. Pending suit by plaintiff for the interest due on the mortgage, the five years expired without his having obtained patent. Held, that judgment must be

*For subsequent opinion in bank, see 112 Cal. 455, 44 Pac. 798.

rendered determining the rights of the parties as of the time of the expiration of the contract period, and not as of the time of the commencement of the action.

APPEAL from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Southern Pacific Railroad Company against Darwin C. Allen for the purchase price of land. From a judgment for plaintiff, defendant appeals. Modified.

Robert Harrison for appellant; Joseph D. Redding for respondent.

HENSHAW, J.—Appeal from the judgment. The action is to compel the payment of moneys alleged to be due under contracts for the purchase of lands, and, in default of payment, to foreclose defendant's rights under the contracts, and for general relief. The contracts are many, but they are alike in terms, and one will serve as a type of all. Plaintiff agreed to sell, and defendant to buy, a certain piece of land. At the date of the contract, defendant paid one-fifth of the purchase price, and one year's interest upon the unpaid portion, and agreed to pay the same interest annually in advance until the completion of the purchase, or the termination of the contract. The time of payment for the unpaid part of the purchase price was "on or before the 1st day of February, 1893"; that is to say, within five years from the execution of the contract. Upon performance by defendant of the conditions of his contract he was entitled—First, to take and hold possession of the land; and, second, to receive a deed for the same, upon demand, and after payment of the remaining four-fifths of the purchase price, which deed plaintiff agreed to make "after the receipt of a patent therefor from the United States." The contract proceeds: "It is further agreed between the parties hereto that the party of the first part claims all the tracts hereinbefore described, as part of a grant of lands to it by the congress of the United States; that patent has not yet issued to it for said tracts; that it will use ordinary diligence to procure patents for them; that, in consequence of circumstances beyond its control, it sometimes fails to obtain patent for lands that seem to be legally a portion of its said grant, therefore nothing in this instrument shall be considered a

guaranty or assurance that that patent or title will be procured; that, in case it be finally determined that patent shall not issue to said party of the first part for all or any of the tracts herein described, it will, upon demand, repay, without interest, to the party of the second part, all moneys that may have been paid to it by him on account of any such tracts as it shall fail to procure patent for, the amount of repayment to be calculated at the rate and price per acre fixed at this date for such tracts by said party of the first part, as per schedule on page 3 hereof; that, said lands being unpatented, the party of the first part does not guaranty the possession of them to the party of the second part, and will not be responsible to him for damages or cost in case of his failure to obtain and keep such possession." This action was brought upon default of defendant in paying the second, third and fourth years' installments of interest. It was commenced before the expiration of the five years' limitation, but was brought to trial and decided after the lapse of that period. Defendant, by answer, denied title in plaintiff, and, by cross-complaint, alleged false representations by plaintiff of its title, injury to himself therefrom, and concluded with an offer of rescission, and demand for a return of the moneys paid by him. The findings are against the answer and cross-complaint, and the decree requires defendant to pay within six months the amount found due as unpaid interest, or be debarred and foreclosed of all right and interest in and to the lands, and in and under the contracts.

The court found plaintiff to be the owner, in fee, of the lands, and much nice argument is advanced for and against the finding. But, under our interpretation of the contract, it is a matter irrelevant. Plaintiff was to convey, not the title it had, nor the title in fee found by a court, but the title evidenced by and under the patent of the United States, and defendant was not to be called upon to consummate the purchase until this muniment of title had issued. The contracts were not void ab initio, for lack of mutuality or consideration. The averments of false representations as to title having been negatived by the findings, the transaction between the parties amounted to this: Plaintiff claimed title to government lands, which claim had not been perfected by the issuance of a patent. The sources of knowledge as to the nature and probable validity of the claim were open to de-

defendant, and he did not, therefore, contract blindly. Under such circumstances, defendant agreed to buy these lands at any time within five years, should defendant's claim ripen into a perfect title by the issuance of a patent. Plaintiff agreed, as the consideration flowing from it—First, to convey to defendant, and thus to forego its right to contract with or sell to anyone else; second, to yield in the meantime to defendant such possession, use and enjoyment of the lands as would otherwise belong to it. Defendant, to secure these advantages to himself, paid one-fifth of the purchase price, and agreed to pay interest upon the remainder of it. If, at any time within five years, plaintiff's title was perfected, defendant had the right to compel a conveyance of it to himself. If, at the expiration of five years, the result had not been reached, defendant was entitled to repayment of his moneys, without interest, while plaintiff, for foregoing its right to make other contracts, and for yielding to defendant its right to the occupancy and enjoyment of the lands, was to be compensated by the use, without payment of interest, of the defendant's moneys held by it. It is true, these terms are not explicitly declared in the contract, as here set forth, but they fairly state the expressed agreement of the parties. Plaintiff, then, being entitled to the use of the moneys annually to be paid as interest, could enforce the collection of them by this action, after persistent refusal to pay, or have defendant foreclosed of his rights under the contract, for violation of its conditions: *Keller v. Lewis*, 53 Cal. 118; *Fairchild v. Mullan*, 90 Cal. 194, 27 Pac. 201; *Hansbrough v. Peck*, 5 Wall. (U. S.) 506, 18 L. Ed. 520. Plaintiff is not asking a rescission. To the contrary, it is demanding that defendant be compelled to perform the conditions of his contract, and that upon his refusal to do so the rights of the parties under the contract be determined in accordance with equity: *Hansbrough v. Peck*, *supra*. The decree gave the defendant the alternative of paying within six months, or suffering foreclosure. It is urged against it that, since the five years had expired, and plaintiff had not obtained a patent, to compel defendant to pay the delinquent interest would be the requirement of a vain thing, since defendant would be entitled to its immediate return, and that, therefore, the court should not have so decreed, but, to the contrary, should have ordered repaid by plaintiff the moneys of defendant in its hands.

The pleadings sufficiently disclose the dates, by which it appeared that the action was tried and determined after the time limited by the contract for its completion. Plaintiff, having failed to secure its patent within that time, was entitled, as has been said—First, to the use of the one-fifth part of the purchase price without payment of interest therefor; and, second, in like manner, to the use of the annual installments of interest as they fell due. Though the decree of the court would have been consonant with equity, had it been rendered before the five years had expired, it failed to do complete justice under the changed-situation brought about by the lapse of that time. While a decree in equity generally operates upon the parties and subject matter as they stood at the commencement of the proceedings, it only does so to subserve the ends of justice. When, as here, a radical change in the status has been brought about by the passing of time, under the very terms of the agreement, and knowledge of this change is, as here, judicially before the court, or is brought in by appropriate pleading, its decree should be addressed to the rights existing, not at the commencement, but at the time of the determination, of the action. The court should therefore decree to plaintiff, in lieu of the use of the interest payments of which it was deprived by the default of defendant, seven per cent interest upon each of these amounts from the date upon which they, respectively, fell due, until the date of the decree; should decree the return by plaintiff to defendant of any excess of the moneys of defendant in its hands over the amount found due, or render a judgment in favor of plaintiff for any deficiency, and, upon a compliance with this judgment, terminate the contractual relations of the parties, as provided by their agreement. Let the judgment and decree be modified accordingly.

We concur: Temple, J.; McFarland, J.

Ex Parte WINTHROP.

Crim. No. 56; June 20, 1895.

40 Pac. 751.

Habeas Corpus—Commitment for Murder—Evidence.—A person committed on a charge of murder will not be discharged on habeas corpus where the evidence points to him, and induces a belief that he may be guilty.

O. W. Winthrop was committed on a charge of murder, and applies for writ of habeas corpus. Writ denied.

W. H. Allen and C. W. Kyle for petitioner; John F. Dare for the people.

BEATTY, C. J.—The prisoner is in custody of the sheriff of San Francisco under an order holding him to answer on a charge of murder, and asks to be released upon the ground that he was committed without reasonable or probable cause. With his return to the writ of habeas corpus the sheriff has submitted a transcript of the evidence adduced at the examination of the prisoner before the committing magistrate, which I have carefully considered. The result is that, while I do not deem it very satisfactory or convincing, I still cannot say that it is legally insufficient to justify the order holding the prisoner to answer. To sustain such an order, it is not necessary that the evidence should be so convincing as to justify a verdict against the suspected party, but it is sufficient if it points to him, and induces a belief that he may have committed the offense charged. It is unnecessary, and would perhaps be improper, to review the evidence in detail; and I content myself with saying that while the conduct and bearing of the prisoner at and subsequent to the time when he was first seen in company with Mrs. Mathews at the cemetery have been those of an innocent and humane man, and while the evidence as to the insurance on her life in his favor, as trustee for her little daughter, is totally insufficient to show any motive for causing her death, there is yet some testimony which, if true, tends to prove that he gave her the strychnine which undoubtedly caused her death. Some of this testimony was perhaps incompetent, but it was admitted without objec-

tion, and it is not clear that its competency might not have been shown if the objection had been made. On the whole, I feel obliged to remand the prisoner. So ordered.

CURTISS v. BACHMAN et al.*

No. 15,769; June 20, 1895.

40 Pac. 801.

Injunction Bond.—A Complaint on an Injunction Bond, conditioned that plaintiff will pay to the parties enjoined such damages as they may sustain by reason of the injunction, which fails to allege that plaintiff in the injunction suit has not paid the damages, does not state a cause of action.

APPEAL from Superior Court, City and County of San Francisco; J. F. Sullivan, Judge.

Action by Gilbert L. Curtiss against N. S. Bachman and others on an injunction bond. Judgment was rendered for defendants, and plaintiff appeals. Affirmed.

Chas. F. Hanlon for appellant; W. B. Sharp for respondents.

BELCHER, C.—One Nettie Gilman commenced an action in the superior court of the city and county of San Francisco against Gilbert L. Curtiss, the plaintiff in this action, and obtained a temporary injunction restraining him from doing certain acts during the pendency of said action. By an order of the court the plaintiff was required to file an undertaking in the sum of \$5,000 to secure the payment of such damages as the defendant might sustain by reason of the injunction, if the court should finally decide that the plaintiff was not entitled thereto; and such an undertaking was executed by the defendants in this action, and filed. That action resulted in a judgment in favor of the defendant therein, and thereupon he brought this action upon the said undertaking to

*For subsequent opinion in bank, see 110 Cal. 433, 52 Am. St. Rep. 111, 42 Pac. 910.

recover the damages alleged to have been sustained by him by reason of the injunction. The undertaking, after setting out the preliminary facts, proceeds as follows: "Now, therefore, we, the undersigned, residents of the city and county of San Francisco, state of California, in consideration of the premises and of the issuing of said injunction, do jointly and severally undertake in the sum of five thousand (\$5,000) dollars, and promise to the effect that in case said injunction shall issue and remain in force and effect the said plaintiff will pay to the said parties enjoined such damages, not exceeding the sum of five thousand (\$5,000) dollars, as such parties may by reason of the said injunction sustain, if the said superior court finally decide that the said plaintiff was not entitled thereto." The complaint, among other things, alleges: "(7) That the plaintiff, Gilbert L. Curtiss, has been injured and damaged by reason of the issuance of said injunction in the sum of five thousand dollars. (8) That, prior to the commencement of this action, plaintiff demanded of the defendants, and each of them, to pay the said amount of said bond, and the damages sustained thereunder, to wit, the sum of five thousand dollars; but to pay the same, or any part thereof, the defendants, and each of them, refused, and have ever since refused, and still refuse." The defendants demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, and their demurrer was overruled. They then answered, denying, among other things, that the plaintiff had been "either injured or damaged by reason of the issuance or continuance of said injunction in the sum of five thousand dollars, or in any sum whatever." The case was tried, and the court found that the plaintiff had not been injured or damaged by reason of the issuance or continuance of the injunction, in any sum whatever, and, as a conclusion of law, that the defendants were entitled to a judgment against the plaintiff for their costs. Judgment was accordingly entered that the plaintiff take nothing by his action, and that the defendants recover their costs, from which, and from an order denying his motion for a new trial, the plaintiff appeals.

The judgment and order should be affirmed, for the reason that the complaint fails to allege any breach of the undertaking sued on. The condition of the undertaking was that "the said plaintiff will pay" such damages, etc. There is no alle-

gation in the complaint that the plaintiff had not paid, or had failed or refused or neglected to pay, the damages. Nor is there any allegation from which such nonpayment can be implied. But an allegation of nonpayment by the plaintiff was necessary, and without it the complaint was fatally defective: *Morgan v. Menzies*, 60 Cal. 341; *Richards v. Insurance Co.*, 80 Cal. 505, 22 Pac. 939; *Grant v. Sheerin*, 84 Cal. 197, 23 Pac. 1094; *Curtiss v. Bachman*, 84 Cal. 216, 24 Pac. 379; *Barney v. Vigoreaux*, 92 Cal. 631, 28 Pac. 678. As the complaint failed to state a cause of action it is unnecessary to consider the case upon its merits, but if it should be so considered, it is doubtful if there could be a reversal on any of the grounds urged. The judgment and order should be affirmed.

We concur: Searls, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

EATON v. METZ, Constable.

No. 19,512; June 27, 1895.

40 Pac. 947.

Wrongful Attachment.—In an Action Against an Officer for property levied on under an attachment against plaintiff's vendor, an averment by defendant that the sale to plaintiff was made with the design on his part, and on the part of his vendor, to delay and defraud the creditors of the grantor, and to prevent the application of the property to the satisfaction of their demands, does not authorize the admission of evidence of actual fraud.

Wrongful Attachment.—In an Action of Claim and Delivery against an officer on account of a levy under an attachment against plaintiff's vendor, defendant may, under a denial of plaintiff's title, show that there was not an immediate delivery or continued change of possession as between plaintiff and his vendor, and he need not specially plead such facts.¹

¹ Cited and followed, with numerous other cases, in *Summerville v. Stockton Milling Co.*, 142 Cal. 548, 76 Pac. 250, where, to support a denial of the plaintiff's right of possession, evidence of a mortgage lien whereby another had the right of possession was admitted.

recover the damages alleged to have been sustained by him by reason of the injunction. The undertaking, after setting out the preliminary facts, proceeds as follows: "Now, therefore, we, the undersigned, residents of the city and county of San Francisco, state of California, in consideration of the premises and of the issuing of said injunction, do jointly and severally undertake in the sum of five thousand (\$5,000) dollars, and promise to the effect that in case said injunction shall issue and remain in force and effect the said plaintiff will pay to the said parties enjoined such damages, not exceeding the sum of five thousand (\$5,000) dollars, as such parties may by reason of the said injunction sustain, if the said superior court finally decide that the said plaintiff was not entitled thereto." The complaint, among other things, alleges: "(7) That the plaintiff, Gilbert L. Curtiss, has been injured and damaged by reason of the issuance of said injunction in the sum of five thousand dollars. (8) That, prior to the commencement of this action, plaintiff demanded of the defendants, and each of them, to pay the said amount of said bond, and the damages sustained thereunder, to wit, the sum of five thousand dollars; but to pay the same, or any part thereof, the defendants, and each of them, refused, and have ever since refused, and still refuse." The defendants demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, and their demurrer was overruled. They then answered, denying, among other things, that the plaintiff had been "either injured or damaged by reason of the issuance or continuance of said injunction in the sum of five thousand dollars, or in any sum whatever." The case was tried, and the court found that the plaintiff had not been injured or damaged by reason of the issuance or continuance of the injunction, in any sum whatever, and, as a conclusion of law, that the defendants were entitled to a judgment against the plaintiff for their costs. Judgment was accordingly entered that the plaintiff take nothing by his action, and that the defendants recover their costs, from which, and from an order denying his motion for a new trial, the plaintiff appeals.

The judgment and order should be affirmed, for the reason that the complaint fails to allege any breach of the undertaking sued on. The condition of the undertaking was that "the said plaintiff will pay" such damages, etc. There is no alle-

gation in the complaint that the plaintiff had not paid, or had failed or refused or neglected to pay, the damages. Nor is there any allegation from which such nonpayment can be implied. But an allegation of nonpayment by the plaintiff was necessary, and without it the complaint was fatally defective: *Morgan v. Menzies*, 60 Cal. 341; *Richards v. Insurance Co.*, 80 Cal. 505, 22 Pac. 939; *Grant v. Sheerin*, 84 Cal. 197, 23 Pac. 1094; *Curtiss v. Bachman*, 84 Cal. 216, 24 Pac. 379; *Barney v. Vigoreaux*, 92 Cal. 631, 28 Pac. 678. As the complaint failed to state a cause of action it is unnecessary to consider the case upon its merits, but if it should be so considered, it is doubtful if there could be a reversal on any of the grounds urged. The judgment and order should be affirmed.

We concur: Searls, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

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recover the damages alleged to have been sustained by him by reason of the injunction. The undertaking, after setting out the preliminary facts, proceeds as follows: "Now, therefore, we, the undersigned, residents of the city and county of San Francisco, state of California, in consideration of the premises and of the issuing of said injunction, do jointly and severally undertake in the sum of five thousand (\$5,000) dollars, and promise to the effect that in case said injunction shall issue and remain in force and effect the said plaintiff will pay to the said parties enjoined such damages, not exceeding the sum of five thousand (\$5,000) dollars, as such parties may by reason of the said injunction sustain, if the said superior court finally decide that the said plaintiff was not entitled thereto." The complaint, among other things, alleges: "(7) That the plaintiff, Gilbert L. Curtiss, has been injured and damaged by reason of the issuance of said injunction in the sum of five thousand dollars. (8) That, prior to the commencement of this action, plaintiff demanded of the defendants, and each of them, to pay the said amount of said bond, and the damages sustained thereunder, to wit, the sum of five thousand dollars; but to pay the same, or any part thereof, the defendants, and each of them, refused, and have ever since refused, and still refuse." The defendants demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, and their demurrer was overruled. They then answered, denying, among other things, that the plaintiff had been "either injured or damaged by reason of the issuance or continuance of said injunction in the sum of five thousand dollars, or in any sum whatever." The case was tried, and the court found that the plaintiff had not been injured or damaged by reason of the issuance or continuance of the injunction, in any sum whatever, and, as a conclusion of law, that the defendants were entitled to a judgment against the plaintiff for their costs. Judgment was accordingly entered that the plaintiff take nothing by his action, and that the defendants recover their costs, from which, and from an order denying his motion for a new trial, the plaintiff appeals.

The judgment and order should be affirmed, for the reason that the complaint fails to allege any breach of the undertaking sued on. The condition of the undertaking was that "the said plaintiff will pay" such damages, etc. There is no alle-

gation in the complaint that the plaintiff had not paid, or had failed or refused or neglected to pay, the damages. Nor is there any allegation from which such nonpayment can be implied. But an allegation of nonpayment by the plaintiff was necessary, and without it the complaint was fatally defective: *Morgan v. Menzies*, 60 Cal. 341; *Richards v. Insurance Co.*, 80 Cal. 505, 22 Pac. 939; *Grant v. Sheerin*, 84 Cal. 197, 23 Pac. 1094; *Curtiss v. Bachman*, 84 Cal. 216, 24 Pac. 379; *Barney v. Vigoreaux*, 92 Cal. 631, 28 Pac. 678. As the complaint failed to state a cause of action it is unnecessary to consider the case upon its merits, but if it should be so considered, it is doubtful if there could be a reversal on any of the grounds urged. The judgment and order should be affirmed.

We concur: Searls, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

EATON v. METZ, Constable.

No. 19,512; June 27, 1895.

40 Pac. 947.

Wrongful Attachment.—In an Action Against an Officer for property levied on under an attachment against plaintiff's vendor, an averment by defendant that the sale to plaintiff was made with the design on his part, and on the part of his vendor, to delay and defraud the creditors of the grantor, and to prevent the application of the property to the satisfaction of their demands, does not authorize the admission of evidence of actual fraud.

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The judgment and order should be affirmed, for the reason that the complaint fails to allege any breach of the undertaking sued on. The condition of the undertaking was that "the said plaintiff will pay" such damages, etc. There is no alle-

gation in the complaint that the plaintiff had not paid, or had failed or refused or neglected to pay, the damages. Nor is there any allegation from which such nonpayment can be implied. But an allegation of nonpayment by the plaintiff was necessary, and without it the complaint was fatally defective: *Morgan v. Menzies*, 60 Cal. 341; *Richards v. Insurance Co.*, 80 Cal. 505, 22 Pac. 939; *Grant v. Sheerin*, 84 Cal. 197, 23 Pac. 1094; *Curtiss v. Bachman*, 84 Cal. 216, 24 Pac. 379; *Barney v. Vigoreaux*, 92 Cal. 631, 28 Pac. 678. As the complaint failed to state a cause of action it is unnecessary to consider the case upon its merits, but if it should be so considered, it is doubtful if there could be a reversal on any of the grounds urged. The judgment and order should be affirmed.

We concur: Searls, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

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The judgment and order should be affirmed, for the reason that the complaint fails to allege any breach of the undertaking sued on. The condition of the undertaking was that "the said plaintiff will pay" such damages, etc. There is no alle-

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We concur: Searls, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

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Wrongful Attachment.—In an Action of Claim and Delivery against an officer on account of a levy under an attachment against plaintiff's vendor, defendant may, under a denial of plaintiff's title, show that there was not an immediate delivery or continued change of possession as between plaintiff and his vendor, and he need not specially plead such facts.¹

¹ Cited and followed, with numerous other cases, in *Summerville v. Stockton Milling Co.*, 142 Cal. 548, 76 Pac. 250, where, to support a denial of the plaintiff's right of possession, evidence of a mortgage lien whereby another had the right of possession was admitted.

APPEAL from Superior Court, San Diego County; George Puterbaugh, Judge.

Action of claim and delivery by Fred. B. Eaton against A. W. Metz, constable. From a judgment for defendant, plaintiff appeals. Affirmed.

Trippet, Boone & Neale and A. L. Gill for appellant; W. S. Wise and E. W. Britt for respondent.

SEARLS, C.—This is an action in claim and delivery to recover the possession from defendant of thirteen horses, one four-horse wagon, and one set of double harness, or their value, alleged to be \$2,000. The amended answer contains two separate defenses. The first denies the ownership or possession of the plaintiff of the property described in the complaint, or any part thereof, or that it is of any value exceeding \$1,200, or that defendant at any time took the same, or any part thereof, from the possession of the plaintiff, or that he wrongfully withholds the same from said plaintiff. The second defense avers that A. C. Eaton was and is the owner of the property described in the complaint, and justifies taking the same as a constable of the township of Perris, in the county of San Diego, under and by virtue of sundry writs of attachment issued out of justice court in and for said township, in actions pending therein in favor of sundry persons against said A. C. Eaton. Defendant further averred as follows: "Defendant, here answering, is informed, and believes, and therefore alleges, that the said Fred. B. Eaton claims to be the owner of the property described in his complaint herein, in virtue of an alleged sale thereof to him by the said A. C. Eaton; and defendant avers also, upon his information and belief, that such alleged sale was made for the purpose and with the design, on the part of said A. C. Eaton and Fred. B. Eaton, to hinder, delay, and defraud the creditors of the said A. C. Eaton, particularly [naming them], and to prevent the taking and application of such property to the satisfaction of the demands of such creditors against said A. C. Eaton." The cause was tried by the court, and written findings filed, upon which judgment was entered in favor of the defendant for the redelivery to him of all the property described in the complaint, except one horse, viz.: "One sorrel horse, blind of one

eye, mentioned in the complaint, or the sum of one hundred and twenty-five dollars, the value thereof." Defendant had costs. Plaintiff appeals from the judgment. The case comes up on the judgment-roll, containing a bill of exceptions, in which the evidence is set out. The court found, in substance, among other things, that at the date of the levy by defendant (on or about October 5, 1892) the plaintiff was the owner of the sorrel horse described in the complaint, but was not the owner of the other property, or any part thereof, but that A. C. Eaton, the father of the plaintiff, was the owner thereof; that plaintiff claims to be the owner of all the property (except the sorrel horse) by virtue of an alleged sale thereof, made to him on or about June 25, 1892; that such sale was not accompanied by an immediate delivery of the property, although such property was then in possession of said A. C. Eaton, and that there was never an actual or continued change of possession. Upon the charge that the sale was made for the purpose and with the design, by the plaintiff and A. C. Eaton, to hinder, delay, or defraud the creditors of A. C. Eaton, etc., the finding is in favor of the plaintiff, and to the effect that it was not made for any such purpose or with such design. At the trial, plaintiff introduced evidence to show that he was the owner of the property in dispute, and that it was taken by defendant without his consent, etc. At various stages of the trial, in the cross-examination of plaintiff's witnesses, and when testimony was offered on behalf of defendant, counsel for plaintiff objected to the introduction of any and all testimony tending to show fraud, upon the ground that there was no pleading to support the same. The court overruled these several objections, and the rulings are assigned as error.

The contention of the plaintiff here is that fraud must be pleaded by setting up the facts constituting it; that general allegations are insufficient, and that defendant's answer failed to set out any facts upon which fraud could be predicated. In support of this proposition we are referred to the following cases: *Sukeforth v. Lord*, 87 Cal. 402, 25 Pac. 497; *Pehrson v. Hewitt*, 79 Cal. 598, 21 Pac. 950; *Mason v. Vestal*, 88 Cal. 396, 22 Am. St. Rep. 310, 26 Pac. 213; *Wetherly v. Straus*, 93 Cal. 284, 28 Pac. 1045; *Albertoli v. Branham*, 80 Cal. 633, 13 Am. St. Rep. 200, 22 Pac. 404. As was said in *Mason v. Vestal*, supra: "A defendant is not required to an-

ticipate the source from which the plaintiff claims to derive his title, but if he does proceed to set up the acts of fraud which he charges rendered plaintiff's title invalid, he must state facts which are sufficient in law to that end." And if a defendant pleads fraud in general terms, if a demurrer is interposed to his plea, or, in the absence of such demurrer, if the evidence tending to prove the supposed fraud is objected to at the trial upon the ground of immateriality, it is error to admit it. But, in the absence of a demurrer, or objection to evidence under such general plea, there is no error of which the losing party can complain: *Sukeforth v. Lord*, supra. The defense of actual fraud in the case at bar was even more general than that set up in the answer in *Sukeforth v. Lord*, and, objection having been made to all evidence offered in support thereof, we must hold (waiving for the present the question of the admissibility of the evidence under other portions of the answer) that the court below erred in its admission. But the plaintiff was not injured by such error, for the palpable reason that the finding of the court upon the issue of actual fraud was in his favor. The finding reads as follows: "That such alleged sale was not made for the purpose and with the design, on the part of the said A. C. Eaton or Fred B. Eaton, to hinder, delay, and defraud his creditors, and to prevent the taking and application of such property to the satisfaction of the demands of such creditors against him, the said A. C. Eaton." Error without injury is not cause for reversal.

It is further objected by appellant that the findings of the court as to constructive fraud are without the issues, because the only kind of fraud which is attempted to be pleaded is actual fraud. It is proper to say that, whatever conclusion may be reached in regard to the admission by defendant of title in the plaintiff by the plea of a fraudulent sale of the property, as set out in the second defense of defendant, such admission only goes to that defense. To illustrate: A, the payee of a promissory note, sues B, the maker. B sets up three separate defenses: (1) That he never made the note; (2) that he has paid it; (3) that it is barred by the statute of limitations. The second and third defenses admit the making of the note; but it is only for the purposes of such defenses that the admission applies, and under the first defense the plaintiff must still prove the making of the note. Each defense must be consistent with itself, but need not be con-

sistent with the others: *Bell v. Brown*, 22 Cal. 671; *Willson v. Cleaveland*, 30 Cal. 192; *Buhne v. Corbett*, 43 Cal. 264. Defendant, in his first defense, having, as hereinbefore stated, denied the title of plaintiff to the property, and the latter having, as he was bound to do, introduced evidence of ownership in himself, the defendant was at liberty to combat such claim of ownership by showing that there was not an immediate delivery or a continued change of possession, as between plaintiff and his vendor, and that defendant, as a constable acting under a valid writ against the vendor, and in favor of his creditor, had taken the property pursuant to the command of such writ. These were facts which, under section 3440 of the Civil Code, went to defeat the title set up by plaintiff, and needed not to be specially pleaded, such title being denied: *Grum v. Barney*, 55 Cal. 254; *Mason v. Vestal*, 88 Cal. 396, 22 Am. St. Rep. 310, 26 Pac. 213.

The bill of exceptions fails to show that any objections were made to testimony tending to show that defendant was a constable acting under valid writs of attachment, or that the parties in whose favor such writs issued were creditors of plaintiff's vendor; and the objections to the findings fail to specify any insufficiency of evidence on these points, being directed to the evidence going to the facts as found—that plaintiff was not the owner of the property; that A. C. Eaton was such owner; that the sale from said A. C. Eaton to plaintiff was not accompanied by an immediate delivery and a continued change of possession of the property sold, although such property was at the time of such sale in the possession of said A. C. Eaton; and that defendant (except as to the sorrel horse) did not take the property from the plaintiff wrongfully or at all. Upon these alleged insufficiencies of evidence there was such a substantial conflict as must preclude a reversal here. Under such circumstances, it becomes unnecessary to detail the evidence, or to dwell upon the peculiar relations of the parties, the manner in which the property was used after the pretended sale, or the suspicious circumstances involved in the transaction. The judgment appealed from should be affirmed.

We concur: Belcher, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

Ex Parte MEYER.

S. F. No. 57; June 27, 1895.

40 Pac. 953.

Perjury—Evidence.—On an Examination for Perjury it appeared that defendant, on his voir dire as trial juror, stated, when asked if he knew the proprietor of a certain gambling place, that he had nothing to do with "such places"; that at the place referred to gambling prohibited by statute was carried on; that defendant visited places where gambling not prohibited by statute was carried on. Held, that he was not guilty of perjury.

Julius Meyer was arrested for perjury, and makes application for a writ of habeas corpus. Allowed.

Andrew J. Clunie for petitioner; Edgar D. Peixotto for respondent.

BEATTY, C. J.—The petitioner has been held to answer on a charge of perjury, and asks to be discharged, upon the ground, among others, that he was committed without reasonable or probable cause. The evidence adduced before the committing magistrate is, in my opinion, wholly insufficient to sustain the charge as laid in the information, or any charge. It seems that one Paulsell was on trial in the superior court on a charge of robbing the proprietors of a faro bank. The petitioner, being a member of the regular panel of trial jurors in attendance upon that department of the superior court, was called into the jury-box and examined on his voir dire touching his qualifications as a juror. He was questioned by the prosecution, and passed. Counsel for defendant then asked him the following question, among others: "Do you know a man named Carrall, or Ross, or Webber, the men who were proprietors of the gambling house at 620 Market street?" To which he answered: "No, sir; I have nothing to do with such places." The charge is that the latter part of this answer was false; that in fact petitioner did have something to do with "such places." It appears from the evidence that the place kept by Carrall, Ross & Webber at 620 Market street was a clandestine and illicit gambling house, where a game of faro was conducted. The game of faro, as well as all bank-

ing and percentage games, are prohibited by statute, and those who conduct and carry them on are subjected to heavy penalties of fine and imprisonment: Pen. Code, sec. 330. Such games are necessarily conducted in secret, and the places where they are carried on are guarded by every precaution to prevent discovery and prosecution. And not only are they who conduct the games engaged in an unlawful occupation, but those who go there to bet are also guilty of a misdemeanor. Such, in short, was the character of the place with which the petitioner said he had nothing to do. To prove this declaration false, evidence was adduced at the examination to the effect that the petitioner had been in the habit of resorting frequently to the Thalia and other places, where, in private club-rooms, the game of poker was played, and where he usually joined in the game. And it also appeared that he had acted as a "booster," a technical term describing a person who, in the interest of the club-house proprietor, takes a hand in a game to keep it from stopping for want of a sufficient number of players, and who is furnished money to bet with, and allowed to keep his winnings as compensation for his services. All this, however, merely tends to prove that Mr. Meyer's pursuits are not of a laudable character; but it does not prove that the Thalia is such a place as the gambling house at 620 Market street. The difference between the two places is just exactly as broad as the difference between legality and illegality, or, in other words, since we have none but statutory crimes, it is as broad as the difference between guilt and innocence. Faro is a game prohibited under heavy penalties; its conductors and patrons are criminals; and the place where it is carried on is a criminal resort. Poker, played for money, however objectionable in fact, is, in the eyes of the law, as innocent as chess, or any game played for simple recreation; and its votaries, and the places where it is played, are not criminal. There is, therefore, no inconsistency between the declaration of the petitioner that he had nothing to do with such places as a faro bank and the fact that he did frequent club-rooms where poker was played for money. And, since there is neither evidence nor accusation of any other false statement made by him, it follows that he cannot be held for perjury, and must be discharged from custody. It is so ordered.

BEDELL v. SCOGGINS et al.

No. 18,416; June 27, 1895.

40 Pac. 954.

Trusts.—Defendant Gave Deceased a Note, for money which he owed her, by which he promised to pay \$400 for her funeral expenses or to return it to her on demand. During her last sickness, deceased handed the note to defendant, saying, "Here is something for you." Held, that an express trust, to expend the money, after her death, for her funeral expenses, was created.¹

Trusts.—Where Deceased Gave Money to Defendant in trust to expend, after her death, for her funeral, and he thus expended it, her administrator cannot recover such sum from him, where all preferred claims have been paid, and it does not appear that the probate court has disapproved of the payments made by him, even admitting that claims against a decedent's estate cannot properly be paid without the sanction of the probate court.

Evidence.—Declarations of Decedent, not Against Interest, relative to a transaction with defendant, are not, in an action by her administrator, admissible in his favor.

APPEAL from Superior Court, Colusa County; John F. Ellison, Judge.

Action by I. M. Bedell, administrator of Henrietta R. Cooke, deceased, against J. N. Scoggins and others. Judgment for defendants. Plaintiff appeals. Affirmed.

H. M. Albery and John T. Harrington for appellant; U. W. Brown, W. G. Dyas and Edwin Swinford for respondents.

BELCHER, C.—On the thirtieth day of December, 1892, Henrietta R. Cooke sold and conveyed to the defendant J. N. Scoggins a lot of land in the town of Colusa. The purchase price of the lot was \$3,000, and of this sum the defendant at once paid \$1,200, by assuming and discharging an indebtedness of Mrs. Cooke in that amount, which was secured by a mortgage on the property. On the 26th of February, 1893, Mrs. Cooke died, and thereafter the plaintiff was duly appointed administrator of her estate by the superior court of

¹ Cited with approval in *Thomas v. Lamb*, 11 Cal. App. 721, 106 Pac. 255, likewise a case of an oral trust created by a dying person.

Colusa county, and qualified as such. In April, 1893, the plaintiff commenced this action to recover the sum of \$1,800, alleged to be the balance of the purchase money still due and unpaid, and to enforce a vendor's lien therefor on the lot. The answer denied that any part of the purchase money was due and unpaid, and alleged that the purchase price, to wit, \$3,000, was paid in full on December 30, 1892. The case was tried by the court without a jury, and, among other things, the court found: "That said sum of three thousand dollars was fully paid and liquidated by said defendant J. N. Scoggins in the manner and according to the agreement and understanding at the time of said purchase had between said Henrietta R. Cooke, since deceased, and said defendant J. N. Scoggins. That, at the time of the institution of this suit, there was nothing due or unpaid on account of the purchase price of said lot of land and premises, but that the whole of said purchase price had been fully paid and discharged." Judgment was accordingly entered that the plaintiff take nothing by his action, from which, and from an order denying his motion for a new trial, he appeals.

The appellant contends that the findings were not justified by the evidence, and that numerous errors of law were committed by the court in the rejection of offered evidence, and hence that his motion for new trial should have been granted. As to \$1,400 of the purchase money, there was direct and positive testimony that that sum was paid to Mrs. Cooke on the day the deed was executed. Scoggins testified: "I paid Mrs. Cooke \$1,400, and gave her my note for \$400 on the 30th of December, 1892—note and receipt—for her place; and released a mortgage on that place, and took it upon my old place, making altogether \$1,200, and the \$1,400, making \$2,600. My wife was present when the money was paid. No one else was present. The note was, in case she dies, to have the money ready for her funeral expenses. This paper [identifying] is the note, signed by me. On the opposite side is a receipt which I drew up to give her in place of the note, on the start, and she said, 'Maybe you had better give me a note.' The receipt was drawn first. Then the note was drawn, on the back of the receipt. They were drawn on the 30th of December, 1892." Mrs. Scoggins testified: "I am the wife of the defendant J. N. Scoggins. Was in Colusa on the thirtieth day of December, 1892; was at Mrs. Cooke's resi-

dence on that day, when certain moneys were paid to Mrs. Cooke, on the purchase price of this land. I saw Mr. Scoggins pay her the money. He came in and paid her the money. He handed it out by the hundred, and laid it in her lap. He handed out \$1,400, and then they were talking about the other \$400; and, as they were talking about that, I went out to the old part of the house, and was gone a few minutes, and when I came in Mr. Scoggins was reading the receipt or note, and he gave it to her, and she said that was satisfactory to her." J. E. Farris testified: "I reside in Colusa, and am a carpenter. Was in town in January, this year. Knew Mrs. Cooke in her lifetime. Know about the time of the sale of her property to Mr. Scoggins. I did work on the place. About the 7th of January, I had a conversation with Mrs. Cooke, in her house, concerning the transaction. Q. You may state about that conversation. A. Well, she came to the door and beckoned me, and I went in, and she said, 'Why should I not be one of the happiest women on earth?' I said I didn't know why. She said she had sold her property, and had plenty to keep her as long as she lived, and that she had the use of those two rooms as long as she paid rent on them, and had plenty to keep her as long as she lived, and that she had made necessary arrangements for her funeral expenses. Q. Did she say anything about her receiving her money from the property? And, if so, what did she say about that? A. She said she had received her money." To meet and overcome this evidence, the plaintiff proved that, after the sale of her property, Mrs. Cooke deposited no money in the bank at Colusa, and sent none, even through the bank, or by express, or by mail; and that, at the time of her death, she had no money in her possession, except \$85, contained in a purse which a Mrs. Westcott brought and delivered to her during her last illness.

It is earnestly urged that, in view of all the circumstances shown to have attended the transaction, the defendant's evidence as to the payment of the \$1,400 was wholly incredible, and ought not to have been believed. But while, of course, it seems strange that the money, if paid, should have disappeared as it did, and no one be able to account for it, still, the question as to whether the evidence in regard to the payment was true or false was a matter for determination by the trial court, and, under a well-settled rule, its conclusions cannot be disturbed in this court.

As to the remaining \$400, defendant introduced in evidence a receipt and note reading as follows:

"Colusa, December 30, 1892.

"Received from Mrs. H. R. Cooke four hundred dollars, to be used as funeral expenses or returned to Mrs. H. R. Cooke on demand. \$400.

"[Signed] J. N. SCOGGINS."

"\$400.

Colusa, December 30, 1892.

"After her [Mrs. Cooke's] death, or at her [Mrs. Cooke's] demand, I promise to pay the sum of four hundred dollars, in United States gold coin, to the aid and assistance of her [Mrs. Cooke's] funeral expense, or at her [Mrs. Cooke's] demand. Made this 30th day of December, 1892.

"J. N. SCOGGINS, Marshal.

"Colusa, Cal."

Scoggins testified that he drew the receipt first, and offered it to Mrs. Cooke, and she said, "Maybe you had better draw up a note, so in case anything happens to you I will have it to show," and that he then drew the note on the other side of the same paper; that he gave the paper to her, and she said she would return it to him if anything happened; and that, after she was stricken down in her last illness, she handed the paper back to him, saying: "Here is something for you." Scoggins further testified that during her illness Mrs. Cooke gave him \$35 in money, stating that she wished him to see that her doctor was paid; and that he had paid the doctor and a small bill for medicines and her funeral expenses, the several sums aggregating \$435, for which he produced receipts. Appellant contends that these payments by Scoggins were made without authority, and constituted no part of the purchase money, and therefore no defense to the action; that the adjustment of claims against the estate of a deceased person, whether created for funeral expenses or otherwise, is a matter of exclusive probate jurisdiction; and that, had Mrs. Cooke signed the alleged written authority, it was not within her power to create a valid trust for the payment of any indebtedness after her death, without the sanction of the probate court.

Under our statute, an express trust relating to personal property may be created by parol (Civ. Code, secs. 2221, 2222), and the evidence clearly shows that such a trust was created as to the \$400. The delivery and return of the note

were equivalent to a payment of the money by defendant and a return of it to him as trustee. The trust was not extinguished by the death of the trustor, but was intended to be, and apparently was, executed in good faith after her death. Now, conceding that no claim against the estate of a decedent can properly be paid without the sanction of the probate court, still, when, as in this case, preferred claims are paid, and it does not appear that any such claims remain unpaid, or that the probate court has disapproved the payments, we do not think the representative of the estate should be permitted to recover back from the trustee the money so paid. To hold otherwise would require the defendant to pay a second time, and would work out a wrong and injustice, which neither law nor equity will permit, if it can be avoided.

It is objected that, under the answer, this defense was inadmissible, but we think otherwise. The answer alleged full payment on the 30th of December, 1892; and, under that issue, it was competent to show how and when the payment was consummated. During the trial numerous questions were propounded by the plaintiff to his witnesses as to what Mrs. Cooke had said after the sale in regard to its terms, the payments made and to be made, etc. The questions were objected to as irrelevant, incompetent, and immaterial, and the objections were sustained, and exceptions reserved. It does not appear what any of the answers would have been; but, assuming that they would have tended to support the theory of plaintiff, they were clearly inadmissible, the declarations not having been made against the interest of the declarant: Code Civ. Proc., secs. 1853, 1870, subsec. 4. As said in *Fischer v. Bergson*, 49 Cal. 294: "These declarations were not in disparagement of the title of the declarant. They were not offered by the defendant, but by the plaintiff himself, to strengthen his own claim. They had no greater force as evidence than they would have had had the decedent brought this action in his lifetime, in which case the inadmissibility of such declarations would be apparent." We find no prejudicial error in the record, and advise that the judgment and order be affirmed.

We concur: Searls, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

DELAFIELD v. SAN FRANCISCO & S. M. RY. CO. et al.

No. 15,911; June 27, 1895.

40 Pac. 958.

Contract for Services.—A Complaint Alleging Performance of services for defendant and others, at their request, and agreement of defendant to pay therefor, supports a judgment against him alone.

Contract for Services.—One Who Agreed to Pay in Stock and refuses to deliver it is liable for the amount in money.

Contract for Services.—Where the Complaint Alleges the Performance of service, and a promise to pay therefor a certain sum, and the answer alleges a contract to pay a certain amount per month in stock, and admits that a certain number of shares thereof are due, objection to the admission of a contract like that alleged in the answer, except providing for a smaller payment, cannot for the first time be made on appeal, on the ground that it varied from that alleged in the complaint.

APPEAL from Superior Court, City and County of San Francisco; D. J. Murphy, Judge.

Action by Robert H. Delafield against the San Francisco & San Mateo Railway Company and others. Judgment for plaintiff against said company, and it appeals. Modified.

Morrison, Stratton & Foerster for appellant; A. Barnard for respondent.

VANCLIEF, C.—Plaintiff sues as assignee of Harding & Forbes, attorneys at law, to recover \$1,700 for professional services alleged to have been performed by the latter for the San Francisco & San Mateo Railway Company and the S. S. Construction Company (corporations), at their instance and request, and for which, it is alleged, the former company and defendant Joost promised to pay said sum of \$1,700. At the close of the evidence, counsel for defendants moved a nonsuit in favor of the S. S. Construction Company, whereupon counsel for plaintiff, by leave of court, and without objection by any one of the defendants, dismissed the action as against the defendants Joost and the S. S. Construction Company, and prayed for judgment against the San Francisco & San Mateo

Railway Company alone, for the whole sum demanded, and this prayer was granted by the court. The San Francisco & San Mateo Railway Company brings this appeal from the judgment upon the judgment-roll with a bill of exceptions as to matters of law and fact.

1. The principal point made by appellant is that the complaint does not support the judgment. No doubt the S. S. Construction Company and Joost were improperly joined as defendants; but, since the misjoinder was not pleaded, and the action as to them was dismissed without objection, the only question to be considered under this head is whether the complaint supports the judgment against the appellant alone; and I think it should be held that it does. It is alleged in the complaint that Harding & Forbes performed certain services for appellant and the S. S. Construction Company at their instance and request, and that appellant "agreed to pay therefor the sum of seventeen hundred (1,700) dollars."

2. It is contended that the evidence does not justify the finding that the appellant agreed to pay Harding & Forbes in money, but only that it agreed to pay in capital stock of the appellant corporation. It is agreed that the contract by which Harding & Forbes were retained, and under which they rendered the services in question, is correctly expressed in a recorded resolution of the directors of the appellant corporation, as follows: "Resolved, that R. T. Harding and Charles H. Forbes, copartners under the firm name of Harding & Forbes, attorneys and counselors at law, be retained as the attorneys of the company until the 1st day of January, 1892, and that they receive as compensation for their services the sum of \$100 per month, payable in the capital stock of the company, at the rate of \$50 per share, from the 1st day of January, 1891, until the bonds of the company are sold; and then and thereafter the said attorneys shall receive the sum of \$100 per month in cash, payable on the 1st day of each and every month, until the expiration of said term. Said services shall not include the active prosecution or defense of any litigation in which the company may become engaged." It was proved, without conflict of evidence, that the bonds mentioned in the contract were never sold; that for the first two and one-half months of the year 1891 the appellant issued and delivered to Harding & Forbes five shares of its stock in payment of their salary to March 15th, but ever thereafter refused

to deliver to them any more stock, although requested by Harding & Forbes so to do after more stock became due. The legal consequence of such refusal to pay in stock, according to the contract, was that appellant became obligated to pay the salary of \$100 per month in money: *Cummings v. Dudley*, 60 Cal. 383, 44 Am. Rep. 58, and authorities there cited. It is true that the contract was not fully stated in the complaint, as it should have been; but it is alleged in the answer of defendants that appellant "retained said Harding & Forbes as the regular attorneys of said company, and agreed to pay them . . . for their services the sum of \$200 per month, payable in the capital stock of the company at the rate of \$100 per share"; and it is further alleged that the salary at that rate was paid in stock up to March 15, 1891; and it is further expressly admitted "that there is now due and owing to said Harding & Forbes 19 shares of the capital stock of said company." Besides, there was no objection to the admission in evidence of the contract as recorded in the minute-book of the appellant corporation, which, by the way, proved to be more favorable to appellant than that set out in the answer of defendants, inasmuch as it fixed the salary of Harding & Forbes at \$100 per month, whereas it was stated in the answer to have been \$200 per month. Under these circumstances, the appellant should not be heard to object to the contract here for the first time, on the ground that it varies from that alleged in the complaint: *Cummings v. Dudley*, *supra*.

3. Upon the admitted and indisputable facts of the case, the plaintiff is entitled to judgment for \$950, with interest thereon from January 1, 1892, and his costs in the court below, and no more. That is to say, he is entitled to recover the salary of Harding & Forbes from March 15, 1891, until January 1, 1892—nine and one-half months—at \$100 per month, with legal interest and his costs in the trial court, but should pay the costs of this appeal. And it clearly appears that a new trial could not lawfully result in a different judgment. The only ground upon which plaintiff claimed judgment for the additional sum of \$750 was that the defendant Joost had individually promised to take from Harding & Forbes fifteen shares of capital stock of appellant, and to pay them therefor \$50 per share, and had failed to do so; but it was admitted by plaintiff, at the trial, that appellant was not responsible for any default of the defendant Joost.

Other points urged by appellant are considered irrelevant to the merits of the appeal. I think the cause should be remanded, with instruction to the lower court to modify the judgment in accordance with this opinion.

We concur: Belcher, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the cause is remanded, and the court below is instructed to modify the judgment in accordance with said opinion, the costs of the appeal to be taxed to respondent.

DAGGETT v. GRAY et al.*

No. 19,410; June 27, 1895.

40 Pac. 959.

Receiver.—The Complaint in an Action by a Receiver as such, for the conversion of property during his receivership, must allege that his insolvent was the owner or entitled to possession of the property.

Receiver.—A Complaint in an Action by a Receiver, as such, which alleges that the plaintiff was, on a certain date, by order of court in a certain suit against his insolvent, appointed receiver of the insolvent's property, with the right to take possession of and to sue for and demand the same, sufficiently avers plaintiff's appointment as receiver, and his right to sue.

Trover—Demand.—In an Action for Conversion of property by unlawful detention, where the original possession was lawful, the complaint must allege a demand and refusal.¹

APPEAL from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by Henry Daggett, as receiver, against Will M. Gray and others for conversion of property of his insolvent. From

*For subsequent opinion in bank, see 110 Cal. 169, 42 Pac. 568.

¹ Cited in Ah Hoy v. Raymond, 19 Haw. 574, holding that in an action for conversion demand and refusal are necessary when the original taking was lawful, but not when it was wrongful or there was an illegal assumption of ownership or an illegal user.

a judgment for plaintiff and an order denying a new trial defendants appeal. Reversed.

Parrish & Mossholder and Walter Rose for appellants; Johnstone Jones and D. L. Withington for respondent.

SEARLS, C.—This action is brought by the plaintiff, as the receiver of one E. M. Brickey, to recover damages in the sum of \$5,500 for the conversion by defendants of a stock of drugs, claimed to have belonged to said E. M. Brickey, and to which plaintiff, as receiver, claimed to be entitled. The cause was tried by the court without a jury, and judgment rendered in favor of plaintiff for \$915 damages, from which judgment, and from an order denying their motion for a new trial, defendants appeal.

Defendants interposed a demurrer to the complaint upon the ground that it failed to state facts sufficient to constitute a cause of action, which demurrer was overruled by the court, and the ruling is assigned as error. The complaint may be epitomized thus: By an order of the superior court made March 17, 1893, in the case of Mollie S. Brickey, Plaintiff, v. Enoch M. Brickey, Defendant, plaintiff was appointed receiver of the property of defendant, with authority to take and keep possession of the property, receive rents, etc., to sue for and demand the property of said Brickey, and to demand from Brickey or Braun & Co. the stock and fixtures in the drug-store in the Hotel Brewster building, etc. He filed a bond and duly qualified. On said seventeenth day of March, 1893, the plaintiff, as such receiver, was the owner and lawfully entitled to the immediate possession of a stock of goods in the drug-store in the Hotel Brewster building, in San Diego. That on said last-named day "defendants [who are averred to be copartners under the name of F. W. Braun & Co.], then being in possession of said goods, unlawfully converted and disposed of the same to their own use," to plaintiff's damage, etc.

From the foregoing it will be observed that the receiver brought the action in his own name, as receiver, which he well might do under section 568 of our Code of Civil Procedure. There are a few cases in which a trustee, by reason of the title to the trust property being vested in him under the law, may sue in his individual name without any allegation or reference

to the fiduciary relation which he occupies. This is notably so in the case of an assignee in insolvency: *Dambmann v. White*, 48 Cal. 439. So, too, an executor, administrator, receiver, or other trustee may in like manner sue in his own name, where the contract sued on has been entered into with him, and no extrinsic facts need be alleged. But in those cases where the obligation is not incurred to him directly, and in which title to the subject matter is not vested in him by operation of law, and the trustee is called upon to protect trust property, or, otherwise, to bring an action for the benefit of the beneficiary, when no contract has been made with him in his own name, and when his right to represent the beneficiary will not appear without showing the facts which create the trust, then not only the facts must be pleaded showing the cause of action, but also the authority of the trustee to enforce it: *Bliss*, Code Pl., secs. 262-264, and cases there cited. In the present case there is probably a sufficient allegation of the appointment of plaintiff as receiver of the property of Enoch M. Brickey, and of his right to bring the action. There is not, however, any distinct allegation that Brickey ever owned or possessed the property claimed to have been converted by the defendants. If Brickey was not the owner thereof, the plaintiff could not have become the owner, or entitled to the possession thereof, by virtue of his appointment as receiver, and it is in this latter capacity that he brings the action. "In general, a receiver, by virtue of his appointment, is clothed with only such rights of action as might have been maintained by the persons over whose estate he has been appointed, and to whose rights, for purposes of litigation, he has succeeded. It is essential, therefore, in order to sustain a suit brought by him in his representative capacity, that he should allege and set forth the equities of the parties whose rights of action he represents," etc.: *High*, Rec., 3d ed., sec. 201; *Falkenbach v. Patterson*, 43 Ohio St. 359, 1 N. E. 757; *Coope v. Bowles*, 28 How. Pr. (N. Y.) 10, 42 Barb. (N. Y.) 87. So far as is shown by the complaint in this case, the defendants are liable to the plaintiff here to the same extent, and no greater, than they would have been to Enoch M. Brickey, had no receiver been appointed; and the complaint should show that but for such appointment Brickey would have had a cause of action against the defendants, which, by virtue of his appointment, plaintiff is entitled to maintain.

Again, the complaint fails to show that the taking of the property by defendants was unlawful, and yet it fails to aver a demand for its return before suit brought. In cases where the original possession of property is acquired by tort, no demand is necessary before suit brought: *Paige v. O'Neal*, 12 Cal. 496. But where the original possession is lawful, and the detention only is unlawful, a demand is necessary before the action can be maintained: *Campbell v. Jones*, 38 Cal. 507; *Boulware v. Craddock*, 30 Cal. 190; *Sargent v. Sturm*, 23 Cal. 361, 83 Am. Dec. 118; *Ledley v. Hays*, 1 Cal. 160. We are of opinion the complaint was fatally defective.

The judgment and order appealed from should be reversed, and the court below directed to sustain the demurrer to the complaint, with leave to the plaintiff to amend if he shall be so advised.

We concur: Belcher, C.; Britt, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and the court below directed to sustain the demurrer to the complaint, with leave to the plaintiff to amend if he shall be so advised.

COOPER v. WILDER.*

No. 19,566; July 9, 1895.

41 Pac. 26.

Public Lands—Timber Culture—Death of Entryman.—20 Stat. 113, relating to patents to timber culture claims, provides that no final certificate or patent shall be issued unless, at the expiration of eight years from the date of entry, the person making such entry, or, if he be dead, his heirs or representatives, shall prove that for not less than eight years they have cultivated such trees as aforesaid. Held, that one who died within two years after entry had an equitable interest in the land, capable of devise, and the title, when perfected, inured to him in whom the equitable title vested at the date of the issue of the patent.

*For subsequent opinion in bank, see 111 Cal. 191, 52 Am. St. Rep. 163, 43 Pac. 591.

Public Land—Death of Entryman.—Where a Land Patent is Issued to the heirs of a person who made the entry, the courts should decide to whose benefit it should inure.

APPEAL from Superior Court, San Diego County; W. L. Pierce, Judge.

Action to quiet title by Charles Edward Cooper, by guardian, against H. G. Wilder. Defendant had judgment, and plaintiff appeals. Affirmed.

W. H. C. Ecker and Haines & Ward for appellant; James E. Wadham and F. W. Stearns for respondent.

SEARLS, C.—This is an action to quiet the title of the infant plaintiff to a forty acre tract of land, described as the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of section 12, in township No. 14 S., of range No. 2 W., San Bernardino M., situate in the county of San Diego, state of California. The cause was tried by the court without a jury, and judgment entered in favor of defendant, from which judgment, and from an order denying his motion for a new trial, plaintiff appeals.

There is no material conflict in the evidence. The tract of land in question was duly entered as a timber culture claim, under the laws of the United States (it being public land of the United States), in November, 1879, by David Cooper, who occupied the same until his death, which occurred in 1881. By his last will he bequeathed and devised all his property, real, personal, and mixed, to his wife, Narcissa T. Cooper, to the exclusion of his son, Charles Edward Cooper, the plaintiff and appellant herein. Administration was had upon the estate of said David Cooper, and the property, including the land here in dispute, was regularly distributed to the widow and devisee, Narcissa T. Cooper. In 1892 a patent issued to the land in question, which recites, among other things, that the claim of the heirs of David Cooper, deceased, has been established and duly consummated in conformity to law, etc., and then proceeds to grant the land as follows: "Now, know ye that there is, therefore, granted by the United States unto the said heirs of David Cooper, deceased, the tract of land above described, to have and to hold the said tract of land, with the appurtenances thereof, unto the said heirs of David Cooper, deceased, and to their heirs and assigns forever."

In October, 1891, Narcissa T. Cooper (having previously intermarried with one Dodson) executed a mortgage on the land to H. G. Wilder, the defendant, who subsequently foreclosed, purchased the property at a sale, and, no redemption being made, received a sheriff's deed therefor in due time, and holds the title which Narcissa T. Dodson had or could convey therein.

Objection was made at the trial to the introduction in evidence of the probate proceedings upon the will and estate of David Cooper, upon the ground that such proceedings were wholly irrelevant and immaterial to the question of the title to said land, or to any title therein or thereto, of Narcissa T. Dodson, as grantor of defendant. The branch of the case which turns upon this exception is this: Had David Cooper an estate in the land at the time of his death which he could devise by last will to his wife, the grantor of defendant? The solution of the question depends upon the construction to be given to the timber culture act, as amended June 14, 1878: 20 Stat. 113. The clause directly involved is contained in the latter portion of section 2, which is as follows: "And provided further that no final certificate shall be given or patent issued for the land so entered until the expiration of eight years from the date of such entry; and if at the expiration of such time, or at any time within five years thereafter, the person making such entry, or if he or she be dead, his or her heirs or legal representatives, shall prove by two credible witnesses that he or she or they have planted, and for not less than eight years have cultivated and protected such quantity and character of trees as aforesaid, . . . they shall receive a patent for such tract of land." The contention of appellant is: (1) That David Cooper, having died within two years after making his entry, could not have complied with the law which required him to "have planted, and for not less than eight years have cultivated and protected, such quantity and character of trees" as was required by the statute as a condition precedent to his receiving a patent to the land; (2) that the recitals in the patent and the granting clause thereof show that it was "the claim of the heirs of David Cooper, deceased," that was established, etc., according to law, and that it was "unto the said heirs of David Cooper, deceased," etc., that the grant was made.

We do not attach much importance to the fact that the patent issued to the "heirs of David Cooper." It was held at a comparatively early day that where a patent was issued to a man's "legal representatives," or to his "heirs," it was the intention of the land department to leave the question open to inquiry in the proper court as to the party to whom the patent should inure. The land department is not usually in a position to inquire into and settle the rights and equities of claimants under the patent, and cannot properly adjust such rights: *Hogan v. Page*, 2 Wall. 605, 17 L. Ed. 854; *Weeks v. Railroad Co.*, 78 Wis. 501, 47 N. W. 737; *Meador v. Norton*, 11 Wall. 442, 20 L. Ed. 184; *Simmons v. Wagner*, 101 U. S. 260, 25 L. Ed. 910; *Cornelius v. Kessel*, 53 Wis. 395, 10 N. W. 520, and affirmed by the supreme court of the United States in 128 U. S. 456, 32 L. Ed. 482, 9 Sup. Ct. Rep. 122. It may be stated as a general proposition that the patent inures to the benefit of him who has the title, though it issued to another: *Urket v. Coryell*, 5 Watts & S. (Pa.) 60. These cases only go to the rights of those who have title, legal or equitable, to land patented to others, and do not solve the very question in issue, viz., Did David Cooper have such a title as he could devise? Appellant likens the case of one in under a timber culture claim to that of a pre-emptioner, who is universally held to have, as against the United States, no title or right which may not be abrogated by the government at any time before final entry and payment: *Hutton v. Frisbie*, 37 Cal. 475; *Hemphill v. Davis*, 38 Cal. 577; *Montgomery v. Whiting*, 40 Cal. 298; *Kenyon v. Quinn*, 41 Cal. 325; *Rutledge v. Murphy*, 51 Cal. 388; *Buxton v. Traver*, 67 Cal. 171, 7 Pac. 450; *Frisbie v. Whitney*, 9 Wall. 187, 19 L. Ed. 668; *The Yosemite Valley Case*, 15 Wall. 77, 21 L. Ed. 82. When a pre-emptor who has filed his declaratory statement dies before making his final entry and making payment, he has no title which can descend to his heirs, except that the pre-emption law provides that in such cases his executor or administrator, or one of his heirs, may complete the pre-emption, "but the entry in such cases shall be made in favor of the heirs of the deceased pre-emptor, and a patent thereon shall cause the title to inure to such heirs, as if their names had been specially mentioned": U. S. Rev. Stats., sec. 2269; *Elliott v. Figg*, 59 Cal. 117. In the case last cited it was said: "Were it not for this provision, the pre-emption claim would not sur-

vive the pre-emptor. By this provision it survives only for the benefit of his heirs." It is not subject to the claims of his creditors, and the heirs take the title as purchasers from the government, and not by inheritance: *Rogers v. Clemmans*, 26 Kan. 522. So, too, under the Oregon donation act, the same principle has been asserted: *Hall v. Russell*, 101 U. S. 503, 25 L. Ed. 829. In this last case the court, speaking of the heirs, said: "Their title to the land was to come, not from their deceased ancestors, but from the United States. The title, it is true, was granted to them by reason of the possessory rights of their ancestor, but these were rights which he could not transfer, and which passed to them under the statute without any act of his. On his death his heirs became qualified grantees." And again: "It follows from this that Loring, at the time of his death, had no devisable estate in the land, and that the heirs of his devisees cannot maintain this suit."

This much has been said in reference to pre-emptors and claimants under the Oregon donation act for the reason that appellant, on the one hand, holds that like considerations apply to claimants under the homestead and timber culture acts, while the respondent's claim is that there is a clear line of demarcation between the latter and the former; that homestead and timber culture claimants occupy, from the inception of their claims, such contractual relations to the government as gives to them an equitable right to the lands they occupy as such claimants, subject to be defeated only by a failure to perform the conditions subsequent prescribed by the statutes. There seems a substantial basis for this distinction in the adjudged cases. In *Red River etc. R. Co. v. Sture*, 32 Minn. 95, 20 N. W. 229, the court, speaking through Mitchell, J., said: "We are aware that it has been authoritatively decided in *Frisbie v. Whitney*, 9 Wall. 187, 19 L. Ed. 668, and the *Yosemite Valley Case*, 15 Wall. 77, 21 L. Ed. 82, that occupation and improvement on public lands with a view to pre-emption do not confer any vested right in the land as against the United States; that this is only obtained when the purchase money has been paid, and the receipt of the land office given to the purchaser. This is put upon the ground that until such time the proposed pre-emptor has merely a right to be preferred in the purchase over others, provided a sale is

made by the United States. But a homesteader after entry occupies an entirely different position. He has in effect purchased. His entry, which is made by making and filing an affidavit, and paying the sum required by law, is a contract of purchase, which gives him an inchoate title to the land, which is property. This is a substantial and vested right, which can only be defeated by his failure to perform the conditions annexed. It is true, no certificate or patent can be issued until the expiration of five years from the date of entry, the United States retaining the legal title to insure the performance of these conditions. But the vested right of the settler attaches to the land at the time of his entry, and is liable to be defeated only by his own failure to comply with the requirements of the law. . . . Until forfeited by his own failure to perform the conditions of his purchase, this right of property acquired by his entry must prevail, not only against individuals, but against the government itself." In *Carner v. Railroad Co.*, 43 Minn. 375, 45 N. W. 713, which was an action by a claimant under the timber culture act, the court, in referring to what had been said in the *Red River v. Sture* Case, *supra*, added: "The rights under the homestead acts, though differently acquired, are no greater than those under the timber culture act. . . . His rights are analogous to those of one in under a contract to purchase." In *Sturr v. Beck*, 133 U. S. 541, 33 L. Ed. 761, 10 Sup. Ct. Rep. 350, Fuller, C. J., in discussing the rights of a homestead claimant, quotes with apparent approval the opinion of Attorney General MacVeagh, in an opinion to the Secretary of War, July 15, 1881, in which the learned attorney general held in substance the same as in the case of *Railroad Co. v. Sutre*, *supra*: See, also, *Hastings & D. R. Co. v. Whitney*, 132 U. S. 357, 366, 33 L. Ed. 363, 10 Sup. Ct. Rep. 112; *United States v. Ball*, 31 Fed. 667, 12 Saw. 514; *United States v. Turner*, 54 Fed. 228. The consensus of these opinions is to the effect that the homestead entry operates as an appropriation and reservation of the lands embraced within the same, segregates the tract from the public domain, and vests in the claimant an equitable interest therein which is good as against all the world, the government included, until forfeited by failure to perform the conditions of the act of Congress.

The similarity of the provisions of the timber culture act places claimants thereunder in the same category with home-

steads; and, while the comparatively recent period of its adoption prevents the existence of but a limited number of cases thereunder, it is not doubted but that the rule as to an equitable interest in lands taken thereunder should be held the same as in cases of homestead. And as the act of Congress of June 14, 1878 (20 Stat. 113), which provides for the issue of patents to the applicant, or, in case of his death, to his representatives or heirs, does not declare to whom the title shall inure, such title, when perfected, inures to him in whom the equitable title vested at the date of the issue of the patent. The equitable interest which David Cooper had in the homestead he could pass by devise: 1 Pom. Eq. Jur., sec. 105.

It follows that the evidence as to the probate of the last will of David Cooper, the probate proceedings, including the decree of distribution of the land in question to defendant's grantor as the devisee of said David Cooper, as well as the evidence of the mortgage by the widow of said Cooper, the foreclosure and sale thereunder, etc., was properly admitted; and the judgment and order appealed from should be affirmed.

We concur: Haynes, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

JENSEN v. HUNTER et al.

No. 19,321; July 11, 1895.

41 Pac. 14.

Waters—Diversion.—Where Suit was Brought by an Upper riparian owner to compel defendant to desist from taking water from a stream, such compulsory abandonment cannot constitute a consideration for an agreement by another owner to allow defendant to divert the water from a point lower on the stream.

Waters—Adverse Possession.—Title to a Ditch Diverting Water from a stream on the land of plaintiff's decedent cannot be claimed by adverse possession by one who, after using the water for

three years, acknowledged decedent's title by offering to pay for a grant thereof.¹

Waters—Diversion.—An Oral Permission Given to Divert and use water from a stream is a mere license, which is revocable, and does not vest any estate in the land.²

APPEAL from Superior Court, San Bernardino County; John L. Campbell, Judge.

Action by Mercedes Jensen, as executrix, against R. B. Hunter and others, to quiet title. Defendants had judgment, and plaintiff appeals. Reversed.

Paris & Allison and H. W. Nesbit for appellant; Goodcell & Leonard and W. A. Purrington for respondents.

HAYNES, C.—Cornelius Jensen died December 12, 1886, seised of the lands described in the complaint, and plaintiff brings this action, as his executrix, to quiet the title of the estate thereto. The only controversy between the parties relates to an alleged water right and right of way for a ditch claimed by defendants over said lands. The court found in favor of defendants, establishing their right to the water and ditch, and plaintiff appeals from the judgment entered thereon, and from an order denying her motion for a new trial.

The water in question rises above plaintiff's land, and flows through it in a natural stream or watercourse. About four years prior to 1882, the water was diverted by one Kelting at a point above plaintiff's land, and conducted by a ditch to his land, which is now owned by the principal defendant, Margaret Scott, who was formerly the wife of said Kelting. The point of diversion was then upon the land of one Evans, who, in 1882, refused to permit Kelting to longer take the

¹ Cited in Ann. Cas. 1912C, 958, in a note on offer to purchase or purchase of outstanding title or interest by person in possession of land as affecting adverse character of possession.

Cited in Logan v. Guichard, 159 Cal. 598, 114 Pac. 991, and there distinguished from a case where the owner of an irrigation ditch, supplied from a creek—the supply point being on another's land—surrendered, at this other's request, all right as riparian owner in the creek except so far as the ditch was concerned, the creek being on this owner's land at another point.

² Cited and approved in Bashore v. Mooney, 4 Cal. App. 283, 87 Pac. 556, a suit to quiet title to an irrigation ditch.

water out upon his land. Whether any part of the ditch, as it then existed, was upon plaintiff's land does not clearly appear. Jose Jensen testified that "it might have crossed a corner of our land." Phillippe Martinez and one Quintana were interested in the ditch with Kelting, but they were not made defendants. Whether they have or claim any present interest does not appear. The defendants, other than Mrs. Scott, are tenants and encumbrancers of Mrs. Scott's land, which was formerly owned by Kelting, and neither her land nor that of Martinez or Quintana touch the stream from which the water was taken at any point.

Mrs. Scott's answer alleged ownership of the right to divert the water for use on her land, and the right to maintain and use the dam and ditch, by the adverse use and possession thereof for more than five years; and for a second defense alleged a parol agreement between her grantor, Kelting, and said Cornelius Jensen, whereby said Kelting agreed to abandon his right to divert the water "at said higher point," and to abandon the use of the ditch at that point, and that Jensen, in consideration thereof, promised and agreed that Kelting should have the perpetual right to divert the water at said lower point, and the like right to use and maintain a dam and a ditch extending therefrom across Jensen's land to a point where it would connect with the ditch before that used to convey the water diverted at said higher point; that the new ditch was completed in the spring of 1882, and was used thereafter until 1886, when the dam was washed away, and that Jensen then orally agreed with Mrs. Scott that she should have the perpetual right to maintain a dam at a point about two hundred yards above the site of the one washed out, and to construct a ditch from the new dam to connect with the ditch then existing; that the new dam and ditch were used by Mrs. Scott until June, 1888, when plaintiff prevented the further use of the dam and ditch. The court found all the averments of the answer to be true, except that the court was unable to find or determine the quantity of water to which the defendant was entitled, but found that she was entitled to the flow of the water to the full capacity of the ditch, not to exceed, however, three hundred inches measured under a four-inch pressure, that being the quantity she alleged she was entitled to.

Appellant contends that the findings are not justified by the evidence. The answer, as we have seen, alleged a consideration for the parol agreement alleged to have been made by Jensen with Kelting for the right to construct the dam and ditch on the land of the former. That consideration is alleged to have been the abandonment by Kelting of the right to divert the water at a point above Jensen's land. The evidence, however, shows that about four years before the construction of the dam and ditch on Jensen's land Kelting diverted the water upon the land of one Evans, and that Evans brought suit against Kelting, and compelled him to desist from taking the water, and it was this enforced abandonment of the diversion of the water and use of the former ditch that is referred to as the consideration of Jensen's alleged parol agreement with Kelting. Such enforced abandonment could not constitute a consideration for the alleged agreement. There was, however, no evidence that any promise or agreement was made by Jensen, whether by parol or otherwise, at or before the construction of the dam, conferring upon Kelting a right to the water, or to construct the dam or ditch; nor was there any evidence in support of the allegation that when the dam was washed away in 1886 Jensen orally agreed with Mrs. Scott that she should have the perpetual or any right to maintain a dam or ditch at any place upon his land; but the evidence shows that the first dam and ditch constructed upon Jensen's land was by his license or permission, and that after that dam was washed away another dam was constructed at a different place, and a new ditch taken out and connected with the old one, also with Jensen's permission. That the construction of the dam and ditch was not based upon any assertion of right in Kelting or his associates, Martinez and Quintana, who assisted in their construction and participated in the use of the water, is clear. Neither of them were riparian proprietors, and the place of diversion which they had been compelled to abandon, as well as the water diverted, was the private property of Evans. The particulars of the litigation with Evans do not appear in the record, but it must be assumed from the result that they had no right. If they had purchased the water right from Evans, the right to the ditch across his land would have been sustained; and a right acquired by adverse possession would have been equally efficacious to sustain their right to both the

water and the ditch. If, therefore, they had no right to the water as against Evans, they could have no right to it as against Jensen, and defendants cannot now assert any title to either the water or the ditch, unless it has been acquired by adverse possession, there being not only no evidence of any grant, but both the answer and the evidence on the part of the defendants concede that no conveyance of the right was ever made.

In *Pitzman v. Boyce*, 111 Mo. 387, 33 Am. St. Rep. 536, 19 S. W. 1104, a case involving a similar question, it was said: "The question to be first determined in this case is whether the use was really adverse to the owner, or was it merely permissive in its character? If permissive in its inception, then such permissive character, being stamped on the use at the outset, will continue of the same nature, and no adverse user can arise until a distinct and positive assertion of a right hostile to the owner, and brought home to him, can transform a subordinate and friendly holding into one of an opposite nature, and exclusive and independent in its character." In *Thomas v. England*, 71 Cal. 456, 460, 12 Pac. 491, it was said: "To perfect an easement by occupancy for five years, the enjoyment must be adverse, continuous, open, peaceable. It must be adverse, and under claim of legal right so to do, and not by the consent, permission, or indulgence merely of the owner of the alleged servient estate." That the use of the dam, ditch, and water by the defendants was not under a claim of "legal right" is apparent from the testimony of Mrs. Scott, the principal defendant, as well as from the testimony of other witnesses. Mrs. Scott, it is true, testified that she used the water peaceably until about two years before the trial, and during that time claimed it as her own property. She further testified, however, as follows: "I went to Mr. Cornelius Jensen to get him to give me a writing for the right of way, and took money along to pay him for it. He said it was not necessary, the water was mine, and he could not take it, and nobody else, and offered to defend me if I had any trouble with it. This conversation was two or three years before Jensen died." She further testified that she had three or four conversations with him about the water, and that he always said it was hers; that she never had any writing from Mr. Jensen for the right of way; that he said it wasn't necessary, that he gave it to her husband, and she had had it so

long it was hers without any writing. Mrs. Berkmere, a sister of Mrs. Scott, testified that she went with Mrs. Scott to see Mr. Jensen; that they went because they heard other parties were talking of buying the water from Jensen. "We thought we would go to Mr. Jensen, and pay him something to secure this water—not the water, the right of way." Mr. Ferris, a witness called by the defendants, testified to the changes in the location of the dam and ditch; that the dam was put on Jensen's place because Evans had sued them and stopped them; that Jensen said she could take it across his land, so that she would not lose her garden or use of the place. Upon cross-examination he was asked: "Q. Did he say he would simply give permission to run the water through his land? A. Yes, sir; he had let them have a chance to have some water there. I took it from what he said that he should let her have a right of way. I asked him one time why he did not deed it to her if he wanted her to have it, and he said it would be all right. He said Mrs. Kelting had a big family, and he wanted her to have the use of the water, and that he might not want the water for some time. He told me that he would not sell any of that water—that he wanted Mrs. Kelting to have it"; and, in reply to a question whether Jensen did not say that he might need the water himself sometime, answered, "No, sir; he told me he could never use that water on his land, and it was thought so at that time." These conversations testified to by Mr. Frank Ferris took place about 1884. Frank Wilkinson, for defendant, testified that he was with John Berkmere when he tried to get some writings from Jensen giving Mrs. Kelting (now Mrs. Scott) a right of way. That also was in 1884. Phillippe Martinez, called by the plaintiff, testified, in substance, that he was interested in the ditch with Kelting and Quintana; that they went to Jensen and got permission to take out the ditch; that Jensen said he was willing that his neighbors should have the use of the water; that the dam would often break, and he would go and get permission to build another, and to take out a new piece of ditch, but that Jensen never sold or gave the right of way; that in 1886, shortly before Mr. Jensen died, he went to him on behalf of Kelting, Quintana and himself to purchase the right of way for the ditch, and the water right, and offered to give him \$1,000 for it; that "Jensen said he did not care about it, as he was about to die, and his heirs would

be left so they could fix his matters." Jose Jensen testified that they had been using the water on the Jensen land about two years.

It is a significant fact that the evidence nowhere discloses any effort to secure from Jensen a grant or conveyance of this valuable water right, and the right to construct and maintain upon his land the dam and ditch necessary to its use and enjoyment, until Mrs. Scott learned that others were talking of buying the water from Jensen, two years or more after the dam and ditch were constructed. It is urged by respondent that she had a right to buy in a title to secure herself, and that by doing so she did not waive any right or title she had. But she did not approach Jensen with any assertion of right, but offered to pay him for the conveyance of a right she did not have. It is true she testified that Jensen told her she did not need any writing, that he had given it to her husband, and used other expressions of like character, but the fact remains that the use had continued but two or three years, that unless she could obtain a conveyance of the right she could have no title otherwise than by adverse possession for five years, and her application at that time was a confession of Jensen's title, and that the only source from which she could obtain title was from him. She asserted no right as against him, and, whatever he may have said to her, the fact remains that he refused to convey the right to her. The testimony of Mr. Ferris, already quoted, shows that he only intended her to have the use of the water temporarily, and that that was the reason he did not convey to her the right by deed. His verbal declarations testified to by Mrs. Scott could not vest in her the title to the water, nor the easement of the ditch. In *Lovell v. Frost*, 44 Cal. 471, it was held "that the offer to purchase or rent the property, and not merely to purchase an outstanding or adverse claim or title to quiet his possession or protect himself from litigation, as in *Cannon v. Stockmon*, 36 Cal. 538, 95 Am. Dec. 205, amounted to a clear and unequivocal recognition of the defendant's title. Such recognition proves that the plaintiff's intestate did not, at that time, claim the title as against the defendant, and, the recognition having been given before the full period of the statute had run, the plaintiff is precluded from relying on the statute as vesting in his intestate the title as against the defendant; for in order to secure that position his possession must not only have

been adverse to the defendant, but he must also have claimed the title as against the defendant during the entire statutory period": See, also, *Central Pac. R. Co. v. Mead*, 63 Cal. 112, and *Pacific Mut. Life Ins. Co. v. Stroup*, 63 Cal. 150, 154. The elements of adverse possession are very clearly stated in *Unger v. Mooney*, 63 Cal. 586, 49 Am. Rep. 100, and need not be repeated here; and in *De Frieze v. Quint*, 94 Cal. 653, 663, 28 Am. St. Rep. 151, 30 Pac. 1, it was said: "The burden of proving all the essential elements of an adverse possession, including its hostile character, is upon the party relying upon it"; but here the use by Kelting and those interested with him, being by the permission and license of Jensen, was in subordination to his title and possession: *Brumagim v. Bradshaw*, 39 Cal. 24, 37. The facts disclosed by the evidence constituted simply a parol license, founded in personal confidence or favor, and is defined to be an authority to do some act, or a series of acts, on the land of another, without passing any interest in the land: *Cook v. Stearns*, 11 Mass. 533; *Clark v. Glidden*, 60 Vt. 702, 15 Atl. 358; *Houston v. Laffee*, 46 N. H. 505; *East Jersey Iron Co. v. Wright*, 32 N. J. Eq. 248. Kent thus distinguishes it from an easement: "A claim for an easement must be founded upon grant, or by deed, or writing, or upon prescription which presupposes one, for it is a permanent interest in another's land, with a right at all times to enter and enjoy it; but a license is an authority to do a particular act, or a series of acts, upon another's land, without possessing an estate therein. It is founded in personal confidence, and is not assignable": 3 Comm. 452. It is essentially revocable, and its continuance depends on the will of the person by whom it is given (*Bartlett v. Prescott*, 41 N. H. 493; *Tanner v. Volentine*, 75 Ill. 624; *Hill v. Hill*, 113 Mass. 103, 18 Am. Rep. 455); and it is terminated at the death of the party conferring it (*Carter v. Page*, 4 Ired. 424; *De Haro v. United States*, 5 Wall. 599, 18 L. Ed. 681). In the case last cited the court (at page 627) said: "There is a clear distinction between the effect of a license to enter lands, uncoupled with an interest, and a grant. A grant passes some estate of greater or less degree, must be in writing, and is irrevocable unless it contains words of revocation; whereas a license is a personal privilege, can be conferred by parol or in writing, conveys no estate or interest, and is revocable at the pleasure of the party making it. There are also

other incidents attaching to a license. It is an authority to do a lawful act which, without it, would be unlawful, and while it remains unrevoked is a justification for the acts which it authorizes to be done. It ceases with the death of either party, and cannot be transferred or alienated by the licensee, because it is a personal matter, and is limited to the original parties to it. A sale of the land by the owner instantly works its revocation, and in no sense is it property descendible to heirs."

The evidence, showing as it does that the original entry upon Jensen's land in 1882, and the construction of the dam and ditch, and the diversion of the water, were not under a grant, nor upon a claim of right asserted by Kelting and his associates, but under a parol license given by Cornelius Jensen, and that Jensen died in 1886; and, as the license was then terminated, the possession and use by Mrs. Scott may have been adverse from that time; but I see nothing in the evidence justifying the conclusion that prior to that time she had asserted any right or title as against Jensen, who is conclusively shown to have been the owner of the land and water; but, on the contrary, she expressly acknowledged his title in 1884, less than five years before her use of the water and ditch was interrupted by the plaintiff in June, 1888. Where, as here, the evidence clearly shows that the entry and use was under a license merely, convincing evidence of the repudiation of the license, and an unequivocal assertion of a right hostile to the licensor, brought home to him, should be required to set the statute in motion. In the absence of such evidence, a license is a complete answer and defense to a claim of adverse possession or use, set up by the licensee, and some authorities hold that one who enters under a license cannot afterward set up an adverse possession: *Luce v. Carley*, 24 Wend. (N. Y.) 451, 35 Am. Dec. 637; *Blaisdell v. Railroad Co.*, 51 N. H. 483. A man's title to his land should count for something in controversies of this character.

The judgment and order appealed from should be reversed.

We concur: Searls, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed.

Ex Parte CORRAN.

Crim. No. 9; July 24, 1895.

41 Pac. 464.

Agent—Lien for Commissions—Receiver.—The petitioner was employed to superintend a canvass for subscriptions to a publication, and held the subscriptions as security for wages and commissions due to the solicitors and himself; but it appeared that all wages were in fact paid, and that the commissions were not to be paid to the solicitors until the publication was issued. Held, that the petitioner had no right to hold such contracts as against the receiver.¹

Petition for writ of habeas corpus, ex parte Corran. Writ denied.

John H. Dickinson for petitioner.

HARRISON, J.—In the action of Painter v. Painter, for the dissolution of a partnership, pending in the superior court of the city and county of San Francisco, a receiver had been appointed to take charge of the assets of the firm, and an order was made by the court, directing the petitioner herein to deliver to the receiver certain contracts belonging to the firm, which were in its possession; and upon his refusal to comply with the order he was adjudged guilty of contempt, and ordered to be imprisoned in the county jail until he should have complied with said order. The circumstances upon which the order of the court was made were as follows: Painter & Co. were engaged in publishing Langley's San Francisco Directory, and, by virtue of a contract entered into between them and the firm of Francis & Valentine, the latter firm was interested in the publication of the directory, to the extent of twenty per cent on all copies thereof that should be sold by Painter & Co. In October, 1894, the receiver being without funds to proceed with the preparation for publishing the directory for the succeeding year, Francis & Valentine and

¹ Cited and followed in *Michaelson v. Fish*, 1 Cal. App. 120, 81 Pac. 662, holding that one working about a distillery may not retain part of the product, coming into his hands as a mere servant, as security for his wages.

J. Milton Painter, a member of the firm of Painter & Co., employed certain solicitors to make a canvass for the directory, and to secure contracts of subscription and of advertisements therein, and also employed the petitioner to manage and superintend the canvass. For this purpose, Francis & Valentine delivered to the petitioner and said solicitors a number of printed blanks for subscription to the directory and for advertisements therein, and under this employment the solicitors procured a number of contracts, which were turned over to the petitioner, and which are the contracts he was directed to deliver to the receiver. The petitioner resisted the motion in the superior court to compel him to turn over the contracts upon the ground that he had a right to retain them as security for his claim for services in their procurement, and urges in his present application for a discharge that for this reason the court had no jurisdiction to pass upon the conflicting claims of title between him and the receiver, or to adjudge him guilty of contempt for refusing to part with the contracts. The power of the court to pass upon a controverted question of title to property in proceedings of this nature does not, however, arise in this case. The petitioner does not claim to be the proprietor of the contracts, but merely claims that the contracts are held by him "as security for commissions earned by the said solicitors, and wages due them in connection with the said contract, for salary due me as superintendent of such solicitors, and for moneys advanced by J. Milton Painter in connection with the securing of the contracts." He does not, however, state that any wages were due to the solicitors, and although the solicitors made affidavits in his behalf, in which they stated that the contracts were turned over to him in October, 1894, to be held by him until they should be paid their wages, at the rate of \$2.50 per day, during the time they were employed, together with any commissions remaining due on account of their employment, they do not state that they have not since been paid the full amount of their wages; and it was shown by the affidavit of Francis that, with the exception of the commissions, the petitioner and said solicitors have been paid the full amount due them for their services in making said canvass. It was also shown to the court, and not disputed, that the solicitors were not entitled to receive any commissions that may have been earned by them until after the

directory had been published, and the amount due for said subscriptions and advertisements had been collected. Under these facts, it cannot be claimed by the petitioner that the solicitors had any right to retain the contracts as security for their commissions. The petitioner does not claim that he was ever authorized by J. Milton Painter to retain the contracts as security for any moneys advanced by him. The court was therefore fully authorized to find that the reason assigned by the petitioner for retaining the contracts, so far as he claimed to hold them on behalf of the solicitors, had no foundation in fact, and was without merit. His claim to retain them as security for salary due him as superintendent of the solicitors was equally unfounded. We know of no principle of law which authorizes an employee to take or retain property of his employer until his wages shall have been paid. That the contracts were the property of Painter & Co. cannot be controverted. Although the petitioner, as well as the solicitors, state in the affidavits presented by them that they were not employed by Painter & Co., or by anyone on their behalf, they do not either of them state by whom they were employed; and the affidavit of Francis shows with particularity by whom they were employed, and that the employment was on behalf of Painter & Co. It was immaterial to the petitioner whether the contracts could be utilized by the receiver, or whether the withholding of them would be without injury to him or to Painter & Co. If they were the property of Painter & Co., the receiver was entitled to their possession. The writ is discharged and the prisoner remanded.

We concur: Garoutte, J.; McFarland, J.; Temple, J.

BANK OF ESCONDIDO v. THOMAS et al.

No. 19,580; July 25, 1895.

41 Pac. 462.

Party-wall.—In an Action to Enjoin Defendants from using a certain wall as a party-wall, the answer alleged that said wall rested in part on defendants' land. Held, that the issue as to whether plaintiff's building extended over the dividing line was sufficiently raised by the pleadings.

Party-wall.—Where a Board of Directors Consented to Allow defendants to use a wall of the corporation's building as a party-wall, and the defendants erected a building with the knowledge and acquiescence of said directors, the corporation will be estopped to assert that defendants have no interest in the wall; but its remedy, if any, is an action for the recovery of a proportionate part of the cost of said wall.

Party-wall—Injunction.—Where Plaintiff's Wall Projects over defendants' land, equity will not enjoin defendants' use thereof as a party-wall.

APPEAL from Superior Court, San Diego County; George Puterbaugh, Judge.

Action by Bank of Escondido to enjoin W. W. Thomas and another from using a certain wall as a party-wall. Defendants had judgment, and plaintiff appeals. Affirmed.

Cassius Carter, David L. Withington and Withington & Carter for appellant; E. W. Britt for respondents.

BELCHER, C.—The plaintiff is a corporation engaged in the business of banking. In 1887 it acquired the title to, and erected a two-story brick building on, a lot in the town of Escondido, county of San Diego. The defendants owned the two adjoining lots on the west, and shortly after the completion of the bank building they commenced the erection of a two-story brick building thereon, and completed the same early in 1888. To lay the foundation for the west wall of its building, the plaintiff excavated a trench three feet deep and three feet wide, which extended over its line, and upon defendants' land, eleven and one-half inches. In this trench the foundation was laid, covering the whole space at the bottom, but narrowing toward the surface of the ground. The wall erected on this foundation was thirteen inches thick, and it projected over the plaintiff's line to the extent of one-half inch at the ground, one and one-half inches at the second floor joists, and two and one-half inches at the top joists. When defendants were erecting their building, they claimed the right to use the plaintiff's wall as a party-wall, and they inserted therein the joists for each of the three floors of the building, and also plastered the wall without lathing. They also, with plaintiff's consent, cut a doorway through the wall, on the second floor, so that free passage might be had between

the said buildings. After the opening of this doorway the plaintiff was required to pay an additional rate of insurance on its building by reason thereof, and it claimed that defendants should pay such increased insurance, which they did for about a year. Then they put an iron door in the opening, after which no increased insurance was charged. By design, the defendants' building, in finish and general appearance, was made the same as the plaintiff's building; and when finished the two together presented "the appearance of virtually a single building," and ever since they have been known as the "Escondido Bank Block." Later—sometime in 1892, it would seem—the plaintiff, by one of its directors, presented to the defendants a bill for \$300, "for materials and work in partition wall." The bill was not paid, and thereupon, in June of that year, plaintiff commenced this action, alleging "that it is the owner and entitled to the possession" of its described lot of land; that defendants, and each of them, claim some estate or interest in said real property adverse to the plaintiff; and that their claims are without right—and praying that it be adjudged that defendants have no estate or interest whatever in or to said real property, or any portion thereof, and that they be forever enjoined from asserting any claim to the same adverse to the plaintiff. By their answer the defendants disclaimed any right, title, or interest in the land described in the complaint, except the right to use the said wall as a party-wall. The case was tried, and the court found, among other things, that the west wall of plaintiff's building was erected, extending over the dividing line of the lots, as before stated; that, with the knowledge and consent of plaintiff, the defendants inserted the joists of their building into the said wall, and used the same as a party-wall, and that no objections were at any time made by the plaintiff to such use, until the commencement of this action; that said wall is, and since the construction of defendants' building has been, a party-wall, and that plaintiff agreed with defendants that they might use it as such; that, with the consent of plaintiff, the defendants caused a doorway to be opened through the said party-wall, and afterward, to save extra insurance, placed an iron door therein, as above stated; and that defendants claim no interest in the lot of plaintiff, except for the support of said wall, and their right to use the same as a party-wall. Judgment was accordingly entered that de-

fendants have an easement of support in the said land of plaintiff, of and for the said wall, which stands partly on the plaintiff's lot and partly on the defendants' lot, and that defendants have a right to use such wall as a party-wall, and "that defendants have not, nor have any of them, any right, title, or interest in or to the land of plaintiff, except as herein expressly adjudged." From this judgment, and an order refusing to grant a new trial, the plaintiff appeals.

1. In support of the appeal, it is claimed that the finding to the effect that plaintiff's wall extends over the dividing line of the lots to the extent of from one-half an inch to two and one-half inches is not within the issues raised by the pleadings. We see nothing in this point. The answer sets up the facts in regard to the construction of the two buildings, and alleges "that the said wall of the plaintiff's building has, ever since the construction thereof, about the first day of July, 1887, as aforesaid, rested, and does yet rest, in part, on the said land of the defendants, and that the said wall is a party-wall, and ever since about the first day of March, 1888, has been used as a party-wall" by the defendants and the plaintiff. This was quite sufficient to raise the issue passed upon.

2. It is unnecessary to consider at length all the points made in the case, and discussed by counsel. It was shown that during all the time of the construction of the defendants' building the plaintiff was occupying its banking-house, immediately adjacent, and its officers, without raising any objection, daily saw and knew what was being done by defendants. In January, 1888, at a meeting of its board of directors, the subject of the use of the wall by defendants was considered. What was then said and done is thus epitomized in the testimony of Mr. Watson, one of the directors: "Mr. Thomas stated that they were going, or had commenced, to put up a building. He stated it was to be of the general finish of the bank, and wanted to join on our wall. I think either Mr. Graham or myself made a motion that we allow them to do that; that we considered the building would enhance the value and appearance of the bank sufficiently to reimburse the bank for the use of the wall. My impression is there was unanimous consent. I think this was while the board was in session. I am not positive there was any motion, but it was the tenor of the conversation, and I understood it

was agreed to on that basis." There was other testimony of like effect, clearly showing that defendants' right to use the wall as a party-wall was recognized and acquiesced in by the plaintiff and its officers until after it presented its \$300 bill "for materials and work in partition wall." The officers of the plaintiff were its agents, and the rule is that notice to an agent is constructive notice to the principal; and the rule applies to corporations as well as individuals: *Jefferson v. Hewitt*, 103 Cal. 624, 37 Pac. 638. It is true that the defendants were two of the seven directors of the bank during all the time the buildings were being constructed, but that fact is not material, and cannot affect the conclusion reached. Under the circumstances shown, we think the plaintiff should be held estopped from claiming that defendants have no right to use the wall as a party-wall, and that its remedy, if any it had, was an action to recover from defendants their just proportion of the cost of the materials and labor used in the construction of the wall. And, in support of this view, see *Zeining v. Schnitzler*, 48 Kan. 63, 65, 28 Pac. 1007.

3. There is another ground on which the judgment should be affirmed. It was held in *Guttenberger v. Woods*, 51 Cal. 523, that he who seeks equity must do equity; and therefore, so long as the plaintiff's wall, laid on his own land, projects over the defendants' land, the court will not compel the defendants to desist from using it as a party-wall. The rule declared in that case is applicable here, and should be followed. The judgment and order appealed from should be affirmed.

We concur: Searls, C.; Vanelief, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

LUDY v. COLUSA COUNTY.*

No. 18,403; July 27, 1895.

41 Pac. 300.

Road Overseer—Authority to Do Work.—Under Political Code, section 2645, providing that road overseers, under the direction and supervision of the road commissioners, and pursuant to orders of the board of supervisors, must take charge of the highways in their districts, and shall employ the necessary help and keep the highways in good repair, the order of the road commissioner of a district is sufficient authority for the overseer to have repairs done on the road and materials furnished therefor.

A Road Overseer has Sufficient Authority to Make Repairs on roads and obtain material therefor, he having kept within the directions of the road commissioner, who, speaking to him in reference to work on the roads, told him not to work in excess of the funds of the district.

APPEAL from Superior Court, Colusa County; E. A. Bridgford, Judge.

Action by W. W. Ludy against the county of Colusa, for work done as road overseer. Judgment for defendant. Plaintiff appeals. Reversed.

M. J. Keys for appellant; Ernest Weyand for respondent.

GAROUTTE, J.—Plaintiff was road overseer of road district No. 6, Colusa county. As such road overseer, during the fiscal year 1890-91, he individually performed work upon the roads of that district and employed others to do the same, and, at his instance and request, materials were furnished to be used, and which were used, in the repair of the roads of such district. Claims in proper form for the amounts due for this labor and these materials were presented by the various parties to the board of supervisors of Colusa county. These claims were rejected, and thereafter, being assigned to this plaintiff, action was brought to recover judgment thereon. Judgment went for defendant, and this appeal is from such judgment and from the order denying the motion for a new trial.

*For subsequent opinion in bank, see post, p. 381, 45 Pac. 166.

Defendant, by its answer, admits that the labor was performed upon the roads of road district No. 6, and that the materials were furnished for the benefit and repair of such roads, and that said labor was done and materials furnished at the special instance and request of plaintiff, as road overseer; but defendant denies that this labor was done and materials furnished upon the order of the board of supervisors. The court found as a fact that the work done, money expended, and materials furnished were not in pursuance of any order of the board of supervisors of Colusa county, or of the road commissioner of road district No. 6. Judgment for defendant appears to have been based largely upon the foregoing finding of fact, and we think the evidence fails to support it, for the reasons hereafter stated.

Section 2645 of the Political Code provides: "Road overseers, under the direction and supervision of the road commissioners, and pursuant to orders of the board of supervisors, must take charge of the highways within their respective districts, and shall employ all men, teams, watering carts, and all help necessary to do the work in their respective districts, . . . keep them clear from obstructions and in good repair." Under this statute, there is no question but that the road commissioner of this district was authorized to order the work done and the materials furnished which were charged for in the claims presented to the board of supervisors, and which form the basis of this action. The road commissioner, Herd, was the only witness whose testimony in any way bore upon the finding of fact heretofore quoted. He testified, in effect, that he spoke to plaintiff Ludy in reference to work upon the roads, and told him not to "do work in excess of the amount of money apportioned; that is, not to run the district in debt in excess of the funds of the district." The court made an additional finding that "the entire indebtedness incurred against said road district No. 6, prior to the twelfth day of May, including the claim of plaintiff, in the complaint alleged, for the fiscal year ending June 30, 1891, did not equal the receipts from said district for said year"; and, when we consider this finding, in connection with the evidence of the road commissioner, we have no doubt whatever but that Ludy was clothed with ample authority to do this work, and contract for this material.

The question as to the transfer of certain moneys from the common fund to this road district fund during the previous fiscal year, and retransfer thereof to the common fund during the year when these liabilities were created, appears to be an immaterial matter. Neither is it material that the territory comprising road district No. 6 was subsequently lost to Colusa county by the creation of Glenn county. The court made an additional finding, to the effect that plaintiff, as road overseer, did not procure this work to be done or the materials to be furnished. This finding is in direct conflict with the admissions of the pleadings, and this fact, of itself, would appear to necessitate a new trial of the case. While a general demurrer to the complaint was overruled, we think, upon a new trial, the issues would be more clearly defined by an amendment to the complaint, alleging authority in the road overseer to enter into these various contracts; and we recommend an amendment to the pleadings to that effect. For the foregoing reasons, the judgment and order are reversed, and the cause remanded.

We concur: Harrison, J.; Van Fleet, J.

BIGELOW v. BALLERINO.*

No. 19,480; July 31, 1895.

41 Pac. 14.

Streets—Vacation of Alley—Abutting Owner.—Where a public alley is vacated, the right of an abutting owner to the portion adjoining his land is not, as against an abutting owner on the opposite side of the alley, affected by the fact that the vacation was unlawful.

APPEAL from Superior Court, Los Angeles County; W. H. Clark, Judge.

Action by L. M. Bigelow against Bartolo Ballerino to quiet title. Judgment was rendered for plaintiff, and defendant appeals. Affirmed.

Horace Bell for appellant; A. W. Hutton for respondent.

BRITT, C.—There was a street in the city of Los Angeles called "Negro Alley." Plaintiff owned land which, as she

*For subsequent opinion in bank, see 111 Cal. 559, 44 Pac. 307.

claimed, abutted on the westerly side of such alley, and defendant owned land adjacent to the easterly side thereof, opposite to plaintiff's land. In April, 1889, the city council of Los Angeles vacated said alley as a street, and about the same time laid out a new street called "Los Angeles street," a little to the west of said alley. Such new street included nearly all of plaintiff's land, the city paying her for the portion taken. The court found that there was left, however, of her property, a wedge-shaped piece, varying in width from a few inches at the north end to a few feet at the south end, contiguous to said Negro alley, and lying between the westerly line of the alley and the easterly line of the new street. Defendant, claiming the right, upon the vacation of the alley, to extend his frontage to the new street, constructed a small building adjacent to the east line thereof, covering a section about sixteen feet in length of the said narrow strip of plaintiff's land, and extending eastward into what had been Negro alley. Plaintiff brought this action to quiet her title against defendant to the land between her north and south lines lying east of the new street and extending to the middle line of such former alley, and to recover possession of the parcel so built upon by him. She had judgment, and the defendant appeals from the same, and from an order denying his motion for new trial. The only question of any consequence in the case is whether the evidence sustains the finding that plaintiff is the owner of that portion of the narrow strip between Los Angeles street and the line of the former Negro alley, where defendant constructed his building. If she is, then of course she is entitled to resist the encroachments of the defendant on her side of the alley, whether it was lawfully vacated or not, and whether he consented to its vacation or not: Civ. Code, 831. On this question the record is not very clear; but, upon examining the evidence set out, we think the court was justified in its conclusion that plaintiff is the owner of the disputed ground—by long continued possession of herself and her predecessors, if not by paper title. We see no useful purpose to be served by detailing the testimony here. The judgment and order should be affirmed.

We concur: Searls, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

COCKINS v. COOK.

No. 19,515; July 31, 1895.

41 Pac. 406.

Pleading—Variance.—Under Code of Civil Procedure, section 469, providing that no variance between the allegation in a pleading and the proof is to be deemed material unless it has misled the adverse party, where a complaint by a judgment creditor of a corporation against a stockholder alleges that the debt was contracted on June 1st, proof that it was contracted on August 20th is not a fatal variance.

APPEAL from Superior Court, Los Angeles County; Walter Van Dyke, Judge.

Action by William W. Cockins against Joseph A. Cook to recover from defendant the proportion of a judgment against a corporation due from defendant as a stockholder thereof. Judgment was rendered for plaintiff, and defendant appeals. **Affirmed.**

Cole & Cole for appellant; White & Monroe for respondent.

BELCHER, C.—The Artesian Land and Water Company, a corporation, issued twenty bonds for \$1,000 each, dated June 1, 1888, and secured by a mortgage on its corporate property. The defendant, Cook, became the owner of two hundred and seventy shares of the capital stock of said company on the twentieth day of June, 1888, and he continued to be the owner thereof until the twentieth day of November, 1888. The said mortgage was subsequently foreclosed by plaintiff, and under the decree rendered the mortgaged premises were sold. The sum realized from the sale was not enough to satisfy the amount found due the plaintiff on the bonds, and thereupon a judgment against the said company for the deficiency was docketed in his favor. The plaintiff commenced this action to recover from the defendant his proportionate share of the said deficiency judgment, under section 322 of the Civil Code. The complaint alleges, among other things, that the bonds were "made, executed, and issued" on the first day of June, 1888, and that "at all of said dates

and during all of said times, and during and at the time and respective times when said debt was incurred . . . and the said bonds and mortgage were made, executed, and delivered by said corporation aforesaid to this plaintiff, the said defendant, Joseph A. Cook, was a stockholder," etc. The answer alleges that although said bonds bear date on the first day of June, 1888, "yet the same were not made, executed, and issued, or made, executed, or issued, at the date herein last mentioned nor were said bonds sold and negotiated, or sold or negotiated," prior to the month of October, 1889; and denies that defendant "was at the time of the commencement of this action, or at any time subsequent to the month of October, 1889, an owner and holder, or owner or holder, as original subscriber or otherwise," of any shares of the capital stock of said corporation. At the trial it was proved that the bonds "were not issued by the company or delivered to anybody, and no indebtedness was incurred upon them by the company until the twentieth day of August, 1888, or a day or two thereafter, when they were delivered by the company," etc. And the court found that the bonds were delivered by the company on or about the twentieth day of August, 1888, "and at that date the said company incurred an indebtedness on said bonds." Judgment was accordingly entered against the defendant for his proportion of the deficiency judgment, from which, and from an order denying a new trial, he appeals.

The appellant contends that there was a fatal variance between the allegations of the complaint and the proofs as to the time when the indebtedness was incurred; and this is the only point made for a reversal. We do not think this point can be sustained. The general rule invoked that the allegata and probata should correspond is undoubtedly correct, but it does not apply here. The code provides: "No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits": Code Civ. Proc., sec. 469. The main issue at the trial was as to whether defendant was or was not a stockholder at the time the indebtedness was incurred, and it seems impossible that he could have been misled to his prejudice by the averment in the complaint that the bonds were "made,

executed, and issued" on the first day of June, 1888. The judgment and order should be affirmed.

We concur: Searls, C.; Vanciel, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment and order are affirmed.

HOWLAND v. KRETER.

No. 19,478; August 3, 1895.

41 Pac. 332.

Unlawful Detainer.—Evidence introduced by defendant held sufficient to justify verdict.

APPEAL from Superior Court, Los Angeles County; Walter Van Dyke, Judge.

Action by George D. Howland against Leonard Kreter. Judgment for defendant. Plaintiff appeals. Affirmed.

G. D. Howland for appellant; James Burdette for respondent.

BELCHER, C.—This is an action for unlawful detainer, and the facts which need be noticed are as follows: On March 23, 1893, plaintiff leased to defendant fifteen acres of land for a term commencing at the date of the lease and ending January 1, 1894. Covering about one-half of the leased land was an orchard of orange and other fruit trees. The lease contained a covenant on the part of defendant "to keep the orchard entirely free from weeds," and "to plant nothing in the orange orchard, and to allow nothing to grow within four feet of the other trees of the place," and that plaintiff might re-enter for default in any of the covenants. The rent to be paid by defendant for the whole term was \$350, and the last installment thereof—\$50 in amount—was paid by him to plaintiff on August 30, 1893. On the next day, August 31st, plaintiff served notice on defendant that he must perform the

covenants of his lease, and that he was "required to free the orchard entirely from weeds, and to stop the growing of anything that is now growing within four feet of the trees of the place, or deliver up possession of the said premises and appurtenances" to him. On September 5, 1893, plaintiff commenced this action, alleging, among other things, "that defendant has failed and neglected to keep the orchard on said premises free from weeds, but has allowed said orchard to become overrun with weeds, and the said orchard now is and at all times hereinafter mentioned was grown up to and overrun with weeds"; and "that defendant has failed and neglected to allow nothing to grow within four feet of the trees of the place, but did so plant squash seeds that the vines growing from said seeds have climbed to and are now growing in the tops of some of said trees, and at all times hereinafter mentioned were climbing upon and growing in said trees." And the prayer was for judgment declaring the lease forfeited, and awarding the plaintiff restitution and possession of the premises, with damages, etc. The answer denied all of the material averments of the complaint. The case was tried before a jury, and a verdict was returned in favor of defendant, on which judgment was entered. The plaintiff appeals from the judgment and from an order denying a new trial.

The appellant contends that the verdict was not justified by the evidence, and that errors in law were committed by the court in its rulings upon the admission of evidence, and in its instructions to the jury. It would subserve no useful purpose to state the numerous points made, or to enter into any lengthy discussion of them. The questions presented are of easy solution, and, in our opinion, it is enough to say that the evidence introduced by defendant was amply sufficient to justify the verdict; that the rulings upon the admission of the evidence objected to were proper; and that the instructions given to the jury stated the law applicable to the case correctly. The record discloses no prejudicial error, and the judgment and order appealed from should be affirmed.

We concur: Vanclef, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

HUNTER v. MILAM.

No. 19,555; August 3, 1895.

41 Pac. 332.

Marriage—Want of Authority to Perform.—The fact that the person performing a marriage ceremony in California in 1858 was not authorized to perform such ceremonies would not invalidate the marriage, if assented to by the parties and consummated by cohabitation as husband and wife.

Marriage—Necessity of License.—Prior to Act April 9, 1863, a license was not a prerequisite to marriage.

Marriage—Woman Under Age of Consent.—Under Statutes of 1850, page 424, making fourteen years the age of consent, and declaring guilty of a misdemeanor one who joins in marriage a female under eighteen years of age without consent of her parent, the marriage is not void, though consent of the parent is not obtained, the female being over fourteen years old.

Divorce.—A Sworn Complaint by a Female for Divorce from M., filed after her marriage to H., alleging her marriage to M. prior to the time of her marriage to H., and that she and M. "ever since have been and now are husband and wife," is, in the absence of explanation, conclusive, in an action against her by H. to annul his marriage with her, that she and M. were married in due form at the time alleged, and that M. was living, and was her lawful husband, when she married H.

APPEAL from Superior Court, Los Angeles County; J. W. McKinley, Judge.

Action by Jesse Hunter against Jane Elizabeth Milam, sometimes known as Jane Elizabeth Hunter. Judgment for defendant. Plaintiff appeals. Reversed.

Knight, Simpson & Knight and Simpson & Harphan for appellant; S. A. W. Carver for respondent.

SEARLS, C.—Jesse Hunter, the appellant, brings this action to annul a marriage entered into with the defendant at Los Angeles, California, on the third day of July, 1862, upon the ground that at the time of the alleged marriage of plaintiff and defendant the latter had another husband living, viz., one Joseph Milam, from whom she was not divorced, and

which said marriage between said defendant and the said Joseph Milam had not been annulled. The amended complaint avers that prior to the marriage of plaintiff and defendant, viz., in the month of February, 1858, at the county of San Bernardino, state of California, defendant intermarried with one Joseph Milam, who was still living, and from whom she was not divorced, but which marriage was still in force and effect at the time of her marriage with plaintiff; that plaintiff and defendant lived together as husband and wife until 1884, when he learned that Joseph Milam, the defendant's former husband, was still living, whereupon he severed his connection with defendant; and that thereupon defendant brought an action to obtain a divorce from said Milam, and that on the twenty-ninth day of March, 1884, a decree was duly made and entered in the superior court in and for the county of Los Angeles, dissolving the bonds of matrimony between said defendant and said Milam. The answer admits that in the month of February, 1858, a marriage ceremony was performed between her and the said Joseph Milam, but avers, on information and belief, that the person who performed said ceremony had no right or authority so to do. She further alleges that she was at the time but fifteen years of age; that her father and mother, with whom she was living, did not consent to her marriage with said Milam, and that within ten days after said purported marriage she left said Milam, and returned to her parents, and that Milam departed from the county of San Bernardino, since which time she has heard nothing of him, or whether he is living or dead. The answer further avers knowledge on the part of plaintiff of the marriage of defendant previously to his marriage to her, and avers cohabitation with her until May, 1884, etc. An amendment to the answer sets up the statute of limitations as a bar to the action. The cause was tried by the court, written findings made and filed, upon which judgment was entered June 14, 1893. The appeal is from the judgment and from an order denying plaintiff's motion for a new trial. The notice of appeal was served and filed August 14, 1894, more than one year after the entry of judgment, and cannot therefore be considered, so far as it applies to the judgment. Counsel for defendant moved in the court below to strike out the statement of plaintiff upon the ground that no notice of intention to move for a new trial was served or filed within

the time required by law, or within ten days after notice of the decision. The affidavits and testimony upon the motion pro and con are quite voluminous, and present a sharp conflict. Under these circumstances, it can serve no useful purpose to discuss it at length, and it matters not what our views might be were the question presented to us as an original proposition, as it involves an issue of fact which was passed upon by the court below and determined against the contention of the defendant, and, in consonance with an oft-repeated rule, this court will not reverse the conclusion reached by the court below upon questions of fact depending for their solution upon conflicting evidence. The motion for a new trial must therefore be determined upon its merits.

The court below, after finding that plaintiff and defendant were duly married in 1862, proceeded to find that in February, 1858, a marriage ceremony was performed between Joseph Milam and defendant (defendant being then fifteen years of age), by a person unauthorized to perform marriage ceremonies; that no license was procured therefor, and that defendant was at that time living with her parents, who did not consent thereto or know thereof, and that thereafter the said defendant lived with said Milam as his wife for about ten days, when her parents compelled her to leave Milam and return home; that Milam then left the county of San Bernardino, and defendant has not seen or heard from him since; that the said Milam was not living at the time of the said marriage of plaintiff and defendant, and the marriage between defendant and Milam was not in force or effect at the time of the marriage between plaintiff and defendant, and there was no impediment to their marriage on July 3, 1862. These findings, except that in which it is found that plaintiff and defendant were married in 1862, are assailed by appellant as being unsupported by the evidence or as contrary thereto. The conclusion of law drawn from these facts is "that plaintiff and defendant were lawfully married on the third day of July, 1862, and ever since that time have been and now are husband and wife; that plaintiff should take nothing by his action"; and that defendant have judgment for \$500 counsel fees. We are of opinion the findings assailed cannot be upheld.

1. There is not a particle of evidence in the record that the marriage ceremony between Joseph Milam and defendant was

performed by "a person unauthorized to perform marriage ceremonies," as found by the court. There was no evidence as to the person by whom the ceremony was performed, or as to his official character.

2. The fact that a marriage ceremony was performed in this state in 1858, by a person not authorized, would not in itself invalidate the marriage, if assented to by the parties and consummated by cohabitation of the parties as husband and wife.

3. No license was required as a prerequisite to marriage in this state in 1858, or prior to April 9, 1863: 2 Hitt. Gen. Laws, art. 4466; Stats. 1863, p. 244.

4. Fourteen years was the age of legal consent in 1858 (Stats. 1851, p. 186), and defendant, according to her own testimony, was over fifteen years of age when married to Milam.

5. By the marriage act of 1850, any person joining in marriage any male under the age of twenty-one years, or female under the age of eighteen years, without the consent of the parent or guardian of such minor, was deemed guilty of a misdemeanor and subject to a fine: Stats. 1850, p. 424. But the marriage was not void, or even voidable, except in cases where the female was under the age of fourteen years, and was not ratified on her part after reaching the age of fourteen years: Stats. 1851, p. 168.

6. The evidence that defendant was married to Joseph Milam in February, 1858, and that he was living in July, 1862, when she intermarried with the plaintiff, is to be found: (a) In her testimony at the trial, where she says that she was living in San Bernardino when she married Milam against her father's wishes; that her parents were Mormons, and were about to go to Salt Lake, and take her and her sister with them, and that she feared she would be sealed to some old man, and they both ran away, and she married Milam, with whom she lived ten days, when her mother took her home, and in a few days she went to Salt Lake. She further testified that she heard from her nephew that Milam was living in Walla Walla, and that then, by advice of her husband, she consulted counsel, and was advised to apply for a divorce from him. This was in 1883. (b) In December, 1883, defendant filed her sworn complaint against Joseph Milam, in the superior court in and for the county of Los Angeles, in which she

alleged that she and Milam intermarried in the county of San Bernardino, state of California, in February, 1858, "and ever since have been and now are husband and wife"; that defendant resides out of the state of California, and his residence is unknown; that about March, 1858, defendant therein willfully deserted her, etc.—whereupon she prayed that the marriage between herself and the defendant be dissolved, etc. On the twenty-fourth day of December, 1883, the plaintiff in said cause filed an affidavit for the publication of summons against said defendant, Milam, in which, after stating the nature and object of the action, she alleged that defendant could not, after due diligence, be found in California, and that, "to the best of her knowledge, information, and belief, he resides at Walla Walla, Washington territory." On the twenty-ninth day of March, 1884, the cause was tried by the court, and written findings filed, in which the court found that this defendant and said Milam intermarried in the county of San Bernardino in February, 1858, and ever since have been and now are husband and wife; that defendant resided out of the state; that said defendant willfully and without cause deserted the plaintiff therein in March, 1858; that defendant had been regularly served with process, had failed to appear and answer, and that his default had been regularly entered, etc.—whereupon a decree was duly entered whereby it was decreed "that the marriage existing between the plaintiff and defendant [therein] be, and the same is hereby, dissolved, and that plaintiff be and she is hereby freed and absolutely released from the bonds of matrimony," etc. (c) On the sixteenth day of February, 1892, the defendant herein filed her sworn complaint in the superior court in and for the county of Los Angeles, against the plaintiff herein, to procure the annulment of the marriage existing between them, in which complaint she averred: (2) Their marriage in 1862. (3) Her prior marriage in 1858 to Joseph Milam, and his desertion of her, and her ignorance of his whereabouts until after her marriage to the present plaintiff. (4) Her cohabitation with the plaintiff herein until 1884, when she discovered that her former husband, Joseph Milam, was still living; the institution of an action, and the decree of divorce against said Milam. (5) That this plaintiff and defendant herein have not lived together as husband and wife, or at all, since the

decree of divorce against Milam. (6) That there was no issue of either marriage, etc.

The foregoing testimony, which is without substantial conflict, would seem to call for but little comment. The record in the divorce case of Defendant v. Joseph Milam was in the nature of a proceeding in rem, and therefore binding upon, not only the defendant, but all the world: 2 Smith Lead. Cas., 6th Am. ed., 670, and cases there cited. Conceding, however, that this record is not absolutely conclusive of the facts therein enunciated, and which were necessary to confer jurisdiction upon the court in the given case, viz., that the plaintiff and defendant in that case were husband and wife, that defendant therein was living, and that the court had acquired jurisdiction of the case by such service as the law requires, still the admissions in the sworn complaint in that case, and in the action brought by the defendant against her husband, the plaintiff here, were not only sufficient, but, in the absence of explanation, conclusive of the facts that defendant and Joseph Milam were married in due form in 1858, and that said Joseph Milam was living, and the lawful husband of the defendant, at the date of her marriage to this plaintiff in 1862. The testimony of the defendant, tending indirectly to show that the plaintiff knew as well as she did of her former marriage, and of the existence of her husband under such marriage, and that he cohabited with her after her divorce from such former husband, can only be upheld upon the theory that she had deliberately committed willful perjury in her former sworn statements. The order denying a new trial should be reversed, and a new trial ordered.

We concur: Haynes, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order denying a new trial is reversed, and a new trial ordered.

RAFFERTY v. HIGH et al.

No. 19,469; August 8, 1895.

41 Pac. 489.

Mortgages—Counsel Fees.—A Mortgage Expressly Stating that it is given "as security for the payment of" the principal sum of the note, "with interest thereon according to the terms of the note," does not secure counsel fees provided by the note in case of suit being brought against the maker.

APPEAL from Superior Court, San Diego County; W. L. Pierce, Judge.

Action by Mrs. E. C. Rafferty against Annie M. High and others. Judgment for plaintiff. Defendants appeal. Modified.

M. A. Luce for appellants; E. W. Britt for respondent.

VANCLIEF, C.—Action to foreclose two mortgages on the same lot of land, each to secure a distinct promissory note. The rate of interest on each note was fifteen per cent per annum from date of note until payment, payable and compounded semi-annually, and each note contained the following: "And I further agree that, in the event of suit being brought against me, then there shall be added to any judgment against me rendered in said suit, as counsel fees, an additional sum of ten per centum . . . upon the amount of the principal and interest hereof accrued at the time of the entry of such judgment." Each mortgage was expressly given "as security for the payment of" the principal sum of the note, "with interest thereon according to the terms of the note," and a copy of the note secured was set out in each mortgage. But neither mortgage expressly purported to secure the payment of counsel fees in any event. The trial court allowed plaintiff counsel fees amounting to \$178.91, and held that the payment of them was secured by the mortgages, and ordered that they be paid from the proceeds of the foreclosure sale. Counsel for appellants contends that the court erred in holding that counsel fees were secured by the mortgages, and whether or not they were so secured is the only question pre-

sented on this appeal. Upon this question I think the case of *Clemens v. Luce*, 101 Cal. 432, 35 Pac. 1032, is clearly in point for appellants. In that case the note secured by mortgage provided for the payment of counsel fees in the same language and form as in this case; and the mortgages in that case stated that they were given "as security for the payment to said mortgagee of the sum of \$16,000, with interest thereon according to the terms of a certain promissory note, of date September 22, 1891"—setting out a copy of the note—but said nothing about securing counsel fees. In that case this court said: "As to what these mortgages were given to secure, was a matter of pure contract between the parties. They could have been given to secure the principal of the note alone, or the interest alone, or both principal and interest, as was actually done, or they could have been given to secure future advances, and attorney's fees in case of foreclosure. It follows that security for an attorney's fee is not provided for in either mortgage, and consequently such fee cannot be made a lien upon the land, and the judgment of the court in that regard is erroneous." This decision has been affirmed in at least three unreported cases: See list of unreported cases in 101 Cal. xvii. Counsel for respondent cite the case of *Ogborn v. Eliason*, 77 Ind. 393; but in that case it does not appear that the mortgage purported to secure only the principal and interest of the note, as in the case at bar. For aught that appears in the report of that case, the mortgage may have expressly purported to secure payment of the note according to its terms, without specifying merely the principal and interest, and omitting counsel fees, as in this case. I think the court erred in deciding that the payment of counsel fees was secured by the mortgages, and that the judgment should be modified by subtracting from the total amount adjudged to be secured by the mortgages the sum allowed for attorney's fees, to wit, \$178.91; and, thus modified, the judgment should be affirmed.

We concur: Searls, C.; Belcher, C.

PER CURIAM.—For the reasons stated in the foregoing opinion the judgment is modified according to that opinion, and, as so modified, is affirmed. Costs of the appeal to be taxed to the respondent.

DOWLING v. ADAMS et al.

No. 15,913; August 21, 1895.

41 Pac. 413.

Certificate of Surveyor—Authority of Clerk to Sign.—Where a city supervisor is required to sign a certificate as to a public improvement, it cannot be signed by his clerk, who had no specific directions from him to sign it.¹

APPEAL from Superior Court, City and County of San Francisco; J. M. Troutt, Judge.

Action by one Dowling against one Adams and others. Judgment was rendered for plaintiff, and defendants appeal. Reversed.

Horace W. Philbrook for appellants; J. C. Bates for respondent.

PER CURIAM.—Action upon a street assessment. The testimony on behalf of the defendants showed that the certificate of the city and county surveyor, which was recorded in the office of the superintendent of streets, was not made by that officer, but that his name was signed thereto by a clerk in his employ, without any specific directions therefor. The testimony upon this point is almost identical with that given in *Rauer v. Lowe*, 107 Cal. 229, 40 Pac. 337. Upon the authority of that case, the judgment is reversed.

SAVINGS BANK OF SAN DIEGO COUNTY v. FISHER et al.

No. 19,557; August 26, 1895.

41 Pac. 490.

Actions—Misjoinder.—Error, if Any, in Overruling a demurrer to a complaint on the ground that it united with a cause of action for foreclosure of mortgage a cause of action on a guaranty is harmless, the court having found that the guaranty was without consideration.

¹ Cited in the note in Ann. Cas. 1912B, 500, on right of public officer or board to delegate power of approval.

Bills and Notes—Guaranty—Demand and Notice.—An indorser of a note signed the following provision thereon: "I hereby guarantee the payment of the within note, . . . and waive presentation, demand, notice of nonpayment and protest." Held, that as demand and notice of nonpayment need not be given a guarantor, the waiver was by the party as indorser.

APPEAL from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by the Savings Bank of San Diego County against John C. Fisher and others. Judgment for plaintiff. Defendants Mary C. Morse and husband appeal. Affirmed.

M. A. Luce for appellants; McNealy & Whitehead for respondent.

HAYNES, C.—The defendant John C. Fisher on April 11, 1891, made and delivered to the defendant Mary C. Morse his promissory note payable one year after date, and on the same day executed to her a mortgage to secure the same. On July 17, 1891, said Mary C. Morse indorsed said note in blank to the plaintiff, and assigned to it said mortgage. This action was brought against Fisher and the appellants Mary C. Morse and her husband, E. W. Morse, to foreclose said mortgage, and to fix the liability of Mary C. Morse, as indorser and guarantor, in case the mortgaged property should prove insufficient to satisfy the judgment. Findings were filed, and a decree entered foreclosing the mortgage, and directing that if, upon the sale of the mortgaged property, the proceeds should be insufficient to satisfy the amount found due the plaintiff, a deficiency judgment should be docketed against Fisher and said Mary C. Morse. Said Mary C. Morse and her husband appeal from the judgment and an order denying a new trial.

The complaint alleged that at the time Mary C. Morse indorsed said note and assigned said mortgage to the plaintiff she guaranteed the payment of the note, and waived demand and notice, by signing the following words stamped upon the back of the note, to wit: "For value received, I hereby guarantee the payment of the within note, principal, interest, and attorney's fee, and waive presentation, demand, notice of nonpayment, and protest." The defendants Mary C. and E. W. Morse demurred to the complaint upon several grounds, of

which the following only need be noticed: (1) That several causes of action have been improperly united, in this: that an action for the foreclosure of a mortgage against Fisher has been united with an action against Mary C. Morse as guarantor; (2) that these separate causes of action have been united, but are not separately stated and numbered. The second alleged defect was also attacked by motion to require these causes of action to be separately stated.

The court, however, found that the guaranty was made after the note had been indorsed and delivered, and that it was without consideration. It is, therefore, not necessary to discuss or decide whether a cause of action against Mary C. Morse upon the guaranty could be joined with a cause of action against Fisher upon the note; for, if it be conceded that the court erred in not sustaining the demurrer upon that ground, she was not injured, the court having found that she was not liable as guarantor. She was properly joined as a defendant as an indorser, so that the joinder as a party was proper, independently of any question of liability upon the guaranty.

The question arising upon the denial of the motion may be similarly disposed of. Counsel for appellants have not pointed out any possible theory upon which the judgment would have been more favorable to them if the court had ruled differently upon either the demurrer or the motion.

The defendants Mary C. Morse and E. W. Morse answered the complaint, and alleged: (1) That said guaranty was not made or signed at the time the note was indorsed and delivered, but long afterward, and that it was without consideration; (2) that plaintiff is and was a banking corporation, and had not complied with the act of April 1, 1876, requiring it to publish and file for record in the recorder's office a sworn statement of the amount of its capital, the value of its assets, etc.; (3) that plaintiff had delayed bringing the action to foreclosure, that the mortgaged property had greatly depreciated, and Fisher had become insolvent, whereby, etc. Plaintiff's demurrer to the first defense was overruled, and was sustained to the second and third defenses. The only question arising upon the demurrer to the second defense is whether said act of April, 1876, requiring banking corporations to publish and record said statements, was repealed by the act approved March 9, 1893: Stats. 1893, p. 112. That the former act was repealed by the last-mentioned act was expressly decided in

Savings Bank of San Diego v. Burns, 104 Cal. 473, 38 Pac. 102, and that question need not be further considered. As to the third defense, it is not contended by appellants here that it stated facts constituting a defense. The demurrer to the second and third defenses was properly sustained.

The only remaining question is one presented by the motion for new trial, viz., whether the defendant Mary C. Morse waived presentation, demand and notice of nonpayment of said note. Appellants contend that she did not, that she is not liable for any deficiency, and that the judgment against her should be reversed. There is no conflict of evidence. The undisputed facts are that on July 17, 1891, Mrs. Morse transferred said note to the plaintiff by writing her name thereon, without other words; that about a month afterward, and before said note became due, the bank stamped upon the back of the note the words: "For value received, I hereby guarantee the payment of the within note, principal, interest, and attorney's fee, and waive presentation, demand, notice of nonpayment, and protest"; and Mrs. Morse signed her name thereto. No demand and notice of nonpayment is required to be given to a guarantor. His liability attaches immediately upon the default of the principal, without demand or notice: Civ. Code, sec. 2807. Neither party, therefore, could have intended the waiver to aid the guaranty; but banks are not in the habit of releasing any ground of liability, and therefore desired to hold her as indorser without the necessity of a formal demand and notice of nonpayment, while she, if she were willing to guarantee payment, could reasonably have no objection to fixing her liability as indorser by making the waiver. But, however that may be, as the waiver could not relate to or affect the guaranty, and could only have effect or operation upon her liability as an indorser, the court correctly found that she waived demand and notice of nonpayment, and was liable upon her indorsement. The judgment and order appealed from should be affirmed.

We concur: Searls, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

WRIGHT v. WRIGHT.

No. 19,511; August 28, 1895.

41 Pac. 695.

Separate Property—Gift from Husband to Wife.—Where property purchased with community funds is conveyed to the wife by direction of the husband, and with the intent that it shall become separate property, that conveyance will operate as a gift from him to her.

Separate Property.—Where a Complaint Alleges the Making of Deeds to certain property in the wife's name, and that the property was paid for with community funds, and is community property, and the answer admits the making of the deeds, but alleges that the property was paid for with the wife's separate funds, and is her separate and individual property, there is no reversible error in a finding that the deeds were so executed by the instruction of the husband, for the purpose of vesting title in the wife, as her separate and individual property, and not as belonging to the community.

Community Property.—In an Action by a Husband to have Set Aside Conveyances of certain realty to his wife, and to have the property declared community property, the complaint also alleging desertion of him by the defendant, judgment will not be reversed for want of a finding on that particular issue, the court having found that the property was the wife's separate estate.

APPEAL from Superior Court, San Bernardino County;
J. S. Noyes, Judge.

Action by M. V. B. Wright against Margaret D. Wright, his wife, to have set aside a certain conveyance of gift from him to her, and to have the property covered thereby declared community property. There was judgment for defendant, from which plaintiff appeals. Affirmed.

Carver & Preston and D. P. Hatch for appellant; Oscar P. Taylor (John D. Bicknell of counsel) for respondent.

BELCHER, C.—Plaintiff and defendant intermarried in the state of Ohio in 1859, and have ever since been, and now are, husband and wife. In 1873 they came to this state to live, and settled at Riverside. In November, 1878, Hattie L. Traver conveyed to defendant, by a quitclaim deed, twenty

acres of land, situate in what is now the county of Riverside; and in May, 1883, she again conveyed to defendant the same land, by a bargain and sale deed. On the twenty-first day of May, 1885, plaintiff executed to defendant a deed of the same land, which, after referring to the last-named deed, recites that: "Whereas, the conveyance thereof appears on the face of said deed to be community property; and whereas, the consideration paid therefor was from the separate estate of said Margaret Wright; and whereas, I am desirous of placing the title to said property in my wife, Margaret Wright, as her separate property: Now, therefore, in consideration of the premises, I hereby give and grant to Margaret Wright," etc. Subsequently, in 1888, defendant purchased two lots of land in the town of Riverside, and thirty shares of the capital stock of the Riverside Canal Company, taking the title thereto in her own name. Plaintiff and defendant lived and cohabited together in Riverside until January, 1886, when plaintiff left defendant and went to Los Angeles, where he has ever since resided separate and apart from defendant. In May, 1893, plaintiff commenced this action, alleging that all the before-mentioned property was purchased and paid for with community funds, and is the community property of himself and wife; that the deed of May 21, 1885, was obtained by fraudulent misrepresentations on the part of defendant, and that plaintiff did not know the contents of the deed when he signed it, and never discovered the contents or nature and import thereof until January, 1892; that plaintiff never intended to give or grant any part of said land to his wife, but that since obtaining the deed she has deserted him, and has refused, and still refuses, to live with him as his wife, and has during all said time claimed to own all the said property as her own separate estate—and praying that by the judgment and decree of the court the said deed of May 21, 1885, be declared null and void, and be set aside and canceled, and all the property described, both real and personal, be adjudged to be the community property of plaintiff and defendant, and be equitably divided between them. The defendant answered, setting up the purchase by herself of all the property involved in the action, and the payment therefor with money derived from her own separate earnings, and alleged to be her separate funds and estate; denying that plaintiff executed the deed of May 21, 1885, without knowing the contents and import

thereof, and under fraudulent misrepresentations, and alleging that he "voluntarily, of his own free will and accord, executed the aforesaid writing, with the intention and for the purpose of thereby releasing, giving, granting, and conveying to defendant, as and for her separate and individual property and estate, any and all right, claim, and interest which said plaintiff then had, or might thereafter acquire either in law or equity, of, in, and to the aforesaid land, and every part thereof, and that plaintiff, at the time of executing said writing, knew well the full contents and import thereof"; denying that defendant has, for a long time past, or during any time, or at all, deserted the plaintiff, or refused to live with him as his wife, and alleging, on the contrary, that plaintiff has, for more than ten years last past, willfully deserted and abandoned defendant, and has lived separate and apart from her, and during all said time has willfully failed, neglected, and refused to provide for her the common necessities of life.

The court below found that Hattie L. Traver executed to defendant the two deeds, as before stated, and that the entire consideration for the conveyances, and the entire purchase price of said land, was paid by defendant from and out of her own separate property and estate, and that no part of said consideration was community property. The court further found, among other things, as follows: (5) "That the plaintiff directed said Hattie L. Traver to so execute said deeds to the defendant in the name of the defendant, and directed said Hattie L. Traver to so convey said lands to the defendant, with the intention and for the purpose of thereby vesting the title to all said property in the defendant, as and for her separate and individual property and estate, and not as community property." (6) "That said deeds were so executed and said land was so conveyed to the defendant, and in the name of the defendant, with the full knowledge of the plaintiff, and that the plaintiff consented to, acquiesced in, and approved of the manner and form of such execution and conveyance, with the intention and for the purpose of thereby conveying to the defendant as a gift, and vesting in her as a gift, from himself, any and all right and interest which the plaintiff claimed to have in said property." (7) "That on May 21, 1885, the plaintiff executed and delivered to the defendant a deed of gift, conveying to the defendant all the right and interest which the plaintiff claimed in the above-described property;

that the plaintiff, at the time of executing said deed of gift, well knew and understood the full contents, import, and meaning thereof; and that he executed the same voluntarily, and of his own free will and accord, and without any accident or mistake on his part, and without any fraud, deception, or undue influence on the part of the defendant, and with the intention of thereby giving and granting to the defendant, as and for her separate and individual property and estate, any and all right and interest which said plaintiff then claimed to have in said property." (10) "That all the property, real and personal, mentioned and described in the pleadings herein, and in these findings, is the sole and separate property and estate of the defendant, and that no part thereof is, or ever was, community property, and that the plaintiff has not now, and never did have, any interest therein." In accordance with the findings, judgment was entered that the plaintiff take nothing by his action, from which judgment he has appealed, and has brought the case here on the judgment-roll, including a bill of exception.

Counsel for appellant earnestly contend that the earnings of defendant, with which the Riverside land was paid for, are clearly shown by the affirmative averments of the answer to have been community funds, and, therefore, that the said land became and was community property. This question has been very elaborately argued by counsel, but we do not deem it necessary to state or review the points made; for, conceding the argument to be sound, still, if the findings above quoted can be sustained, it is a matter of no consequence whether the original purchase money was separate or community property, as the judgment, in either event, must be affirmed. Under our statute, all property acquired by husband or wife after marriage, except that acquired by gift, bequest, devise or descent, is community property. And prior to the amendment to section 164 of the Civil Code, in 1889, all property conveyed to the wife was presumed to be community property. This presumption, however, could be met and overcome by extrinsic evidence showing that the property was acquired by her in one of the excepted ways above specified in the statute. And where property purchased with community funds was conveyed to the wife by direction of the husband, and with the intent that it should become her separate property, it has many times been held that the conveyance operated as a gift

from him to her: *Peck v. Brummagim*, 31 Cal. 441, 89 Am. Dec. 195; *Woods v. Whitney*, 42 Cal. 358; *Higgins v. Higgins*, 46 Cal. 259; *Read v. Rahm*, 65 Cal. 343, 4 Pac. 111; *Jackson v. Torrence*, 83 Cal. 521, 23 Pac. 695. In the case last cited it is said: "There is no evidence that he [the husband] was indebted to anyone at the time, and if he was free from debt he had the right to give her [his wife] the property, and could make the gift effectual by simply directing the conveyance to be made to her." So, also, it has been held that when a husband himself conveys property to his wife, whether it be his separate property or community property, the conveyance operates to vest the title in the wife, as her separate estate: *Burkett v. Burkett*, 78 Cal. 310, 12 Am. St. Rep. 58, 3 L. R. A. 781, 20 Pac. 715; *Taylor v. Opperman*, 79 Cal. 468, 21 Pac. 869; *Oaks v. Oaks*, 94 Cal. 66, 29 Pac. 330; *In re Lamb's Estate*, 95 Cal. 397, 30 Pac. 568.

But, admitting that such is the law, still it is insisted that finding 5 is outside of the issues raised by the pleadings, and that each of the findings quoted is contrary to, and not supported by, the evidence. The complaint alleges the making of the deeds by Mrs. Traver to defendant, and that the property was paid for with community funds, and is now the community property of plaintiff and defendant. The answer admits the making of the deeds, and alleges that the property was paid for with defendant's separate funds, and is now her separate and individual property. The real issue, then, was as to whether the property purchased became community or separate property; and, to determine that issue, much evidence was introduced, without objection, on both sides. Of course, the general rule is that new matter must be specially pleaded, but that rule seems hardly broad enough to apply to this case, and put the finding complained of outside of the issues raised. But, however this may be, if that and the other findings are justified by the evidence, the judgment cannot be reversed on this ground.

The evidence was in many respects conflicting, but that was a matter for solution by the trial court. The plaintiff testified, "It is my recollection that I directed Mrs. Traver to make the deed to my wife." Defendant testified: "At the time of the Traver conveyance, plaintiff said it was my money paid for the land, and if he had the deed in his own name he could not take up a government claim; it was my money paid for it,

and I ought to have it. He so stated both before and after the deeds were made. After that, Mr. Wright always spoke of the property as being 'Mamma's property,' 'Mamma's ranch,' and said it was my money paid for it." C. W. Craven testified: "I live in Riverside. Have known plaintiff and defendant since 1880. Am their neighbor. Early in my acquaintance, I heard plaintiff, on several occasions, state, in substance, that no one should look to him for anything about the ranch; that he had no right—no part—in the property; that it was Mrs. Wright's property; and that he was to be held for no obligations. . . . Since 1885 I have heard him say the property was his wife's, and he was to be held for nothing financially." Plaintiff testified that, when Mr. Conway brought him the deed of May 21st for its execution, Conway "said that Mrs. Wright could get a loan of \$1,600 from Mr. McFarland, but that Mr. McFarland refused to loan the money unless I would sign away my community rights." S. J. Hinckley testified that in June, 1885, plaintiff told him "that Mr. Conway came to Colton, where he was teaching school, and had a paper, and got him to sign it; that he knew he was signing his rights away, but he didn't care." O. T. Dyer testified, in substance, that early in May, 1885, he was negotiating a loan for Mrs. Wright upon the property in question, and had a conversation with plaintiff about his joining in the execution of the mortgage; that plaintiff said he had no interest in the property, and would not join in the mortgage, or put his name on the note, but that he would deed the land to his wife, and she might do what she had a mind to with it; all he asked was to be let alone. John E. Wright, the son of plaintiff and defendant, testified that between 1887 and 1889 he had a conversation with his father about home matters. "I said to him, 'How did you come to sign that paper that mother said you signed, giving your property right away?' He said, 'Well, she owned the property, and she was not in very good health, and it seemed to worry her that she did not have the entire control, and I just signed it to please her.' . . . He further stated that his wife owned the property any way, and that he didn't see as his signing the paper made any difference." Without discussing the matter further, it seems to us that the evidence above recited is quite sufficient to support and justify the findings as to each of the deeds under which defendant claims title.

It is further urged that the judgment should be reversed because the court failed to find upon the issue of desertion, and upon the allegations found in paragraphs 10 to 17 of the answer. We do not think the judgment can be disturbed on this ground. The court having found that plaintiff directed Mrs. Traver to convey the property to defendant, with the intention and for the purpose of thereby vesting the title thereto in the defendant, as her separate estate, and having further found that the deed of May 21, 1885, was a valid and operative deed of gift, it is wholly immaterial whether the property was paid for with separate or community funds, and equally immaterial whether the plaintiff or defendant had been guilty of desertion. "There should be findings on all the material issues in the case, but a judgment will not be reversed for want of a finding on a particular issue, where it is apparent that the failure to find on that issue is in no way prejudicial to the appellant": *Murphy v. Bennett*, 68 Cal. 528, 9 Pac. 738. The judgment should be affirmed.

We concur: Haynes, C.; Britt, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

PEOPLE v. EVANS.

Crim. No. 1; August 29, 1895.

41 Pac. 444.

Homicide—Appeal.—Where, in a Murder Case, the Only Dispute is as to the identity of the murderer, and there is a sharp conflict in the evidence, the supreme court will not disturb the verdict because not entirely satisfactory.

Homicide—Appeal.—A Verdict of Guilty will not be Set Aside because of the erroneous admission of evidence which is not injurious to defendant.

Homicide—Evidence of Threats.—On Trial for the Murder of T., it was not error to admit evidence that, some time before the murder, defendant, referring to the killing of a certain girl, said that the man who killed her did not intend to kill her; that he was very

sorry for killing the girl; that he meant to kill T., and he would have him yet before he stopped.

Homicide—Evidence of Proficiency in Use of Firearms.—

Where it appears deceased was shot, and there is evidence that defendant, when arrested, said he could not shoot a rifle, or had not shot a gun for a long time, it is proper to admit evidence that he is an expert with the rifle.

Criminal Law—Confession.—The People and Defendant Consented that the preliminary evidence as to the admissibility of an alleged written confession by defendant and a fellow-prisoner, and the argument on defendant's objections, should be heard in the absence of the jury. Held, that the action of the court in proceeding in accordance with such arrangement would not be reviewed, in the absence of objection and exception in the trial court.

Criminal Law.—Where the Defense is Alibi, It is not Error to allow the people, in rebuttal, to contradict the witnesses who testified to the alibi, by disproving the collateral facts testified to by them on their direct examination as a means of fixing the time when they saw defendant at the place distant from the scene of the crime.

Criminal Law—Alibi.—It is not Error to Permit the People to rebut the circumstances called out on cross-examination of the witnesses to an alibi, though no foundation is laid for contradiction, where no objection is made on such ground.

APPEAL from Superior Court, Amador County; John F. Davis, Judge.

William Evans, convicted of murder, appeals from the judgment and from an order denying a new trial. Affirmed.

F. E. Dunlap, D. B. Spagnoli and J. G. Swinnerton for appellant; Attorney General Fitzgerald for the people.

BEATTY, C. J.—The defendant was convicted of murder, and appeals from the judgment and an order denying him a new trial.

It was clearly proved that on June 15, 1893, Michael Tovey, a messenger for Wells, Fargo & Co., while seated by the side of the driver on a stage going from Ione to Jackson, in Amador county, was shot and killed by a man who stood behind and was partly concealed by a buckeye tree growing within ten or twelve feet of the roadside. The circumstances leave no doubt that the killing was premeditated, and that the crime was murder of the first degree, the only dispute being as to the identity of the slayer. He was distinctly seen, at a dis-

tance of not more than twenty feet, by the driver of the stage, and by a passenger who sat behind the driver on top of the stage; but his face was blackened with charcoal, and the lower part of it concealed by the foliage of the tree behind which he stood, and, while the stage driver testified positively that the defendant was the man, the passenger was equally positive that he was not. To corroborate the driver, the prosecution introduced evidence of remarks in the nature of threats by the defendant against the deceased, made prior to the killing; evidence that the defendant, after the killing, spoke of it with apparent pleasure; evidence of similarity of the clothes worn by the defendant and the man who fired the fatal shot; evidence of similarity of walk (a sort of limp) and of general appearance; and evidence of statements and admissions by the defendant implying his guilt, besides other circumstances having some slight tendency, perhaps, to connect him with the killing. On the part of the defense, evidence was introduced to explain or contradict most of the evidence for the people, and, in addition, there was very strong and positive testimony of a number of witnesses to the effect that at the time of the killing the defendant was at a farm many miles distant from the scene. As to the alleged statements and admissions of the defendant, they rested upon the uncorroborated testimony of a man who was confined in jail with him, and there was evidence that he and the officers in charge had conspired, by the administration of whisky and opium, to induce the defendant to sign a written confession under circumstances so questionable that the court would not admit it in evidence. In rebuttal, the people offered evidence contradictory of the witnesses who had been called to prove the alibi. And the result was a case presenting a sharp conflict of evidence on every material point, except the mere corpus delicti, which was fully proved. Under these circumstances, we cannot assume to overrule the verdict of the jurors, who saw and heard the witnesses, upon the ground that the proofs do not seem to be entirely satisfactory to us.

During the trial many exceptions were reserved to rulings of the court upon objections to testimony, but, if any of the rulings complained of were technically erroneous, they were clearly not injurious to the defendant. The stage driver, for instance, while testifying for the people, was asked the question, "Has your stage ever been robbed, Mr. Radcliffe?" to

which the defendant interposed the usual formal and general objection that it was incompetent, irrelevant, and immaterial. The objection being overruled, the witness answered, "Yes, sir." This is all that the bill of exceptions shows in regard to this matter; and, while it does appear that the evidence was irrelevant, it is equally apparent that it was of no consequence.

Mrs. McNeil, a witness for the people, was allowed to testify, over the same general objection by defendant, that, some time previous to the killing of Tovey, the defendant, referring to the killing of the Rudosini girl, had said that the man who killed her did not intend to kill her; that he was very sorry for killing the girl; that he meant to kill Tovey, and he would have him yet before he stopped. The court did not err in overruling the objection to this testimony. If true, it proved a claim on the part of defendant to an intimate knowledge of the feelings, motives, and intentions of the slayer of the Rudosini girl, and might justify the inference that he was himself the person who had slain her, in an attempt to kill Tovey, and that he was the person who intended "to have him before he stopped." In short, it was a threat which indicated a motive for the commission of the crime.

When the defendant was arrested, he stated—at least it was testified that he stated—that he could not shoot a rifle, or that he had not shot a gun for a long time. It was not error to allow proof that he was an expert with the rifle.

When the people offered in evidence the written confession which the defendant was alleged to have made, and the admissions and statements testified to by his fellow-prisoner, the people and the defendant both consented that the preliminary evidence and the argument upon the defendant's objections to the offered evidence should be taken and heard in the absence and without the hearing of the jury. It is now claimed that the order and action of the court, taken in conformity with his consent, was error, and highly injurious to the defendant. It is not necessary to consider whether the action of the court in this matter would have been proper if objected to. It was not objected to at the time, there was no exception taken at the time, and there is nothing to review.

It was not error to allow the people in rebuttal to contradict the witnesses who had testified to the alibi by disproving the collateral facts testified to by them on their direct examination as a means of fixing the time when they saw the de-

fendant at a place distant from the scene of the homicide. These circumstances were an essential part of their testimony, and highly material. The same is true of the circumstances called out on the cross-examination. As to some of these matters, it may be true that no sufficient foundation was laid for contradiction, but no objection was made on that ground in the one or two instances in which it should have been sustained; as, for instance, in the testimony of Wenzelberger in contradiction of Lucas.

The instruction complained of (No. 5 given by the court) is free from error. If the defendant desired a fuller instruction, he should have requested it.

There are other exceptions specified in the record, but the foregoing are all that were mentioned or referred to in the argument, and all that call for special notice. The judgment and order appealed from are affirmed.

We concur: McFarland, J.; Temple, J.; Harrison, J.; Garoutte, J.; Henshaw, J.; Van Fleet, J.

IN RE CARRIGER'S ESTATE.

S. F. No. 155; August 29, 1895.

41 Pac. 700.

Estate of Decedent—Family Allowance.—On Appeal by an administrator from an order directing him to pay the widow of decedent a certain amount per month, as a family allowance, it will be presumed, in the absence of the evidence before the court below, that the condition of the estate was such as to authorize the allowance of the sum fixed in the order.

APPEAL from Superior Court, Sonoma County; S. K. Dougherty, Judge.

In the matter of the estate of William W. Carriger, deceased. Appeal by Solomon Carriger, special administrator of said estate, from an order directing him to pay to the widow of said deceased a certain amount per month, as a family allowance. Affirmed.

Barclay Henley and Cary Howard for appellant; Campbell & Campbell and Aylett R. Cotton for respondent.

PER CURIAM.—The special administrator of the estate of the deceased has appealed from an order of the superior court directing him to pay to the widow of the deceased the sum of \$50 per month, as a family allowance. The order was made after a citation to the appellant and a hearing thereon before the court; but the appeal is presented here without any bill of exceptions or other showing of the matters which were considered by the court in making its order.

Section 1464, Code of Civil Procedure, authorizes the court to make a reasonable provision for the support of the family "until letters are granted and the inventory is returned"; and by section 1466 the court is authorized to make such reasonable allowance out of the estate as shall be necessary for the maintenance of the family, according to their circumstances, "during the progress of the settlement of the estate." The only limitation upon the action of the court in this regard is that, in case the estate is insolvent, the allowance must not be continued longer than one year after granting letters testamentary or of administration. There is no intimation in the return of the special administrator that the estate is insolvent, and, by section 1467, the family allowance must be paid in preference to all other charges, except funeral charges and expenses of administration. Although the appellant, in his return to the petition, states that the funeral charges have not been paid, he does not give the amount of these charges, nor does it appear from the record what is the amount of the decedent's estate. The fact that the administrator has not in his hands sufficient money to pay the family allowance does not deprive the court of the power to fix the amount to be paid. If there is other estate which can be subjected to this payment, the court can make a proper order therefor. In the absence of the evidence which was before the court at the hearing, we must assume that it was fully shown that the condition of the estate was such as to authorize the allowance of the sum fixed in the order. The order is affirmed.

SCOTT v. RHODES et al.

No. 19,537; September 4, 1895.

41 Pac. 878.

Estoppel by Record.—One Claiming Under a Grant by a certain name is conclusively bound by a judicial determination and definition of what land was meant by that name.

Ejectment—Pleading.—Recovery cannot be had in Ejectment for land not specified in the complaint.

APPEAL from Superior Court, San Diego County; E. S. Torrance, Judge.

Ejectment by Maria A. Scott against A. G. Rhodes and others. From a judgment for defendants for costs, and from an order denying a motion for a new trial, plaintiff appeals. **Affirmed.**

Hunsaker & Stevens, Chalmers Scott and E. Parker for appellant; J. O. W. Paine and C. H. Rippey for respondents.

VANCLIEF, C.—Action of ejectment to recover possession of the north half of a tract of land situate in the county of San Diego, described in the complaint by the name "Rancho Buena Vista," and not otherwise. The complaint is in the most general form, alleging plaintiff's ownership and possession of the north half of said tract, and that defendants ejected her therefrom, and withhold from her the possession thereof. The defendants denied plaintiff's alleged ownership and possession, and further denied that they ever entered upon or ejected plaintiff from the land described in the complaint, or that they ever withheld the possession thereof from the plaintiff. The cause was tried by the court without a jury, and the court found that plaintiff was the owner and entitled to the possession of the land described in her complaint as "the north half of the Rancho Buena Vista," but further

found that neither of the defendants ever entered upon or ejected the plaintiff from said north half, or any part thereof, or ever withheld the possession of the same, or any part thereof, from the plaintiff; and as a conclusion of law found "that the plaintiff should take nothing by this action, and that the defendants are entitled to judgment against the plaintiff for their costs," and rendered judgment accordingly. The plaintiff appeals from the judgment, and from an order denying her motion for a new trial.

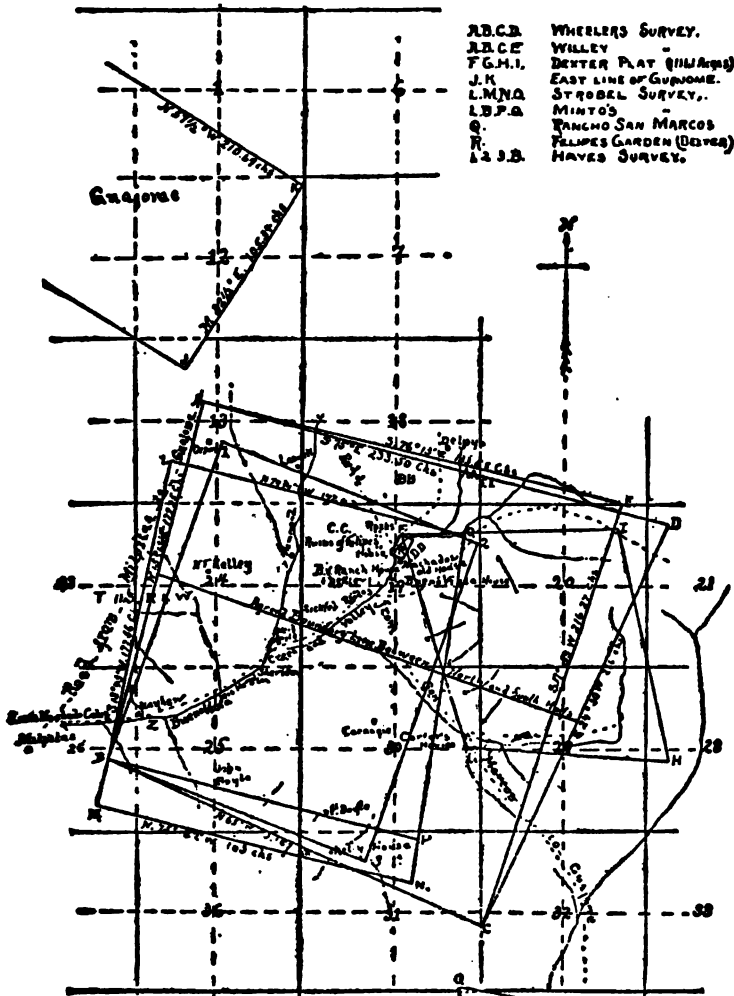
The principal question for decision is one of fact: Did the defendants, or any one of them, oust or eject the plaintiff from any part of the land described in her complaint as the "north half of Rancho Buena Vista," or withhold from her the possession of any part thereof? The evidence shows with reasonable certainty what lands the defendants entered upon and withheld from the plaintiff. Each one of them, as pre-emptor or homestead claimant, separately entered upon a small, defined tract of what he claimed to be government land, outside and west of the Rancho Buena Vista; so that the controversy ultimately relates only to the location of the western boundary line of the Rancho Buena Vista. The plaintiff derived her title from a Mexican grant, made by Governor Pio Pico to an Indian named Felipe in the year 1845, and confirmed by the United States board of land commissioners for this state, and by the United States district court. The petition of Felipe for the grant describes the land as a "small piece of land called 'Buena Vista,' . . . which piece of land consists of half a league in length and one-half in breadth, on which I maintain some little stock that serve for the maintenance of myself and family." After reciting this petition, Governor Pico made the grant in the following words: "After having previously made the necessary investigation according to law and regulations, in the exercise of the powers vested in me, in the name of the Mexican nation, I have concluded to grant him the mentioned land, declaring it his property by the present letters patent and under the following conditions: First. . . . Second. He will solicit of the re-

spective judge to give him juridical possession in virtue of this document, by whom the boundaries are to be marked, putting the necessary landmarks. Third. The land granted is of an extent of half a square league, and the same he actually occupies. The judge who shall give the possession will cause it to be measured according to ordinance, leaving the surplus that may result to the benefit of the nation for convenient purposes." The judge who gave juridical possession reported the measurements and boundaries of the possession given as follows: "As we stood at one of the boundaries of the garden of the Indian Felipe, the line was drawn east, and there were measured and counted two thousand five hundred varas, which terminated at the boundary of Don Lorenzo Soto, where the party interested was ordered to place his landmark. From this place the line was drawn in a south course. There were measured and counted two thousand five hundred varas, which ended at a small peak, where stand two rocks joined together. Here the party interested was ordered to place his landmark. From this point the line was drawn, course west, and there were measured and counted two thousand five hundred varas, which ended at a small red hill, where the party interested was ordered to place his landmark. From this point the line was drawn, course north. There were measured and counted two thousand five hundred varas, which ended upon a hill where there stands a large rock, and the party in interest was ordered to place his landmark." In the order of confirmation by the United States land commission, the grant is described as follows: "The lands of which confirmation is hereby made are known by the name of 'Buena Vista,' and are bounded and described as follows, to wit: Commencing at the northwest corner of the garden of the Indian Felipe, and running east two thousand and five hundred varas to the boundary line of Lorenzo Soto's; thence running south two thousand five hundred varas to a small peak, where stand two rocks, joined together; thence running west two thousand five hundred varas to a small red hill; thence running north two thousand five hundred varas to the place of beginning, on a hill, where

there is a rock—containing in all one-half of a square league. Reference for further description is had to the original grant and to the translation of the original record of judicial possession, both of which documents are on file as evidence in the cause.” In the judgment of the United States district court, affirming that of land commission, the grant is described as follows: “And it is further ordered, adjudged, and decreed that the claim of the appellee is a good and valid claim, and that the said claim be, and the same is hereby, confirmed to the extent of one-half of a square league of land, a little more or less, being the same land which is situated in the county of San Diego, known by the name of ‘Buena Vista,’ and bounded and described as follows: Commencing at the northwest corner of the garden of the Indian Felipe, and running east two thousand five hundred varas to the boundary line of Lorenzo Soto’s; thence running south two thousand five hundred varas to a small peak, where stand two rocks, joined together; thence running west two thousand and five hundred varas to a small red hill; thence running north two thousand five hundred varas to the place of beginning, on a hill, where there is a rock—containing in all one-half of a square league. Reference for further description to be had to the original grant and to the translation of the original record of judicial possession.” The grant has been surveyed by five different United States deputy surveyors—first, by J. C. Hayes, in 1857; second, by Max Strobel, in 1867; third, by William Minto, in 1881; fourth, by W. G. Wheeler, in 1884; fifth, by H. I. Willey, in 1889. All these surveys have been set aside by the interior department, and a sixth survey ordered, which had not been executed at the time of the trial of this case. The plaintiff claims that the survey by Wheeler is correct, but would be satisfied with that by Willey. By these two surveys the western and southern boundaries are identical, and include the land claimed by each defendant.

In the following diagram the quadrangle A, B, C, D, represents the Wheeler survey; that of A, B, C, E, the Willey

survey; and that of F, G, H, I, drawn by me, is intended to represent, proximately, the boundaries of the grant according to courses and distances as stated in the order of confirmation



by the United States land commission, and also in the judgment of the United States district court, without regard to landmarks, except that of the northwest corner of Felipe's garden as the point of commencement, it being agreed by counsel that the garden is correctly located. The quadrangle

F, J, K, I, represents a private survey made for defendants, which they claim to be a correct survey of the land granted.

No scale of distances upon which the map was drawn appears in the transcript except by inference. Mr. Chalmers Scott, the husband of the plaintiff, testified that he was a civil engineer and an attorney at law, and in explaining the map, among other things, said: "Plaintiff claims point A as the northwest corner of the ranch, point B as the southwest corner, point C as the southeast corner, and point E as the northeast corner, although point E is not so far east as we would be entitled to go, in my opinion. This would make the north line of the ranch (reduced to Mexican or Spanish varas) 5,028.92 varas, the east line 5,132.63 varas, the south line 4,784.47 varas, and the west line 4,246.9 varas in length. This is according to the Willey survey. By the Wheeler survey the north line is 5,541.54 varas, and the east line 5,126.22 varas, in length; the south and west lines being identical with the Willey survey." This, however, does not quite agree with the lengths of the lines as expressed in chains on the map, assuming that a Mexican vara is equal to 33 inches English measure, as it is understood to be in this state; and, further assuming that all the lines of the map were drawn upon the same scale, the length of the north line (A, E) of the Willey survey, as expressed in chains on the map, must be a gross error, for though it is nearly one-eighth of an inch longer than the south line of the same survey, it purports to be 68 chains shorter than the south line. Mr. Chalmers also testified that the broken lines on the map show the location of the section and quarter section lines projected from adjoining government surveys. If this is true, the map must be on a scale of two inches for a mile; and this agrees very nearly with the measurements by chain as written on the map, except in case of the north line (A, E) of the Willey survey, which should be about 230 chains instead of 133.58.

The burden of proving that defendants had ousted the plaintiff from, or withheld from her, the possession of some part of the grant, as properly located, was on the plaintiff; but I think she failed to sustain it. The grant in this case is not of a specific quantity within exterior boundaries inclosing more than the specific quantity granted. In her complaint the plaintiff has described the demanded premises only by a name;

but in proving her title she proved a judicial determination and definition of what land was meant by that name, by which determination and definition she is conclusively bound. In the judicial proceedings before the United States land commission and in the United States district court, to which her predecessor in interest was a party, the Mexican grant under which she claims was construed to be a grant of a specific tract of land described by courses, distances, monuments and quantity; and there is no dispute as to the location of the monument named as the point of commencement of the judicial description, to wit, "the northeast corner of Felipe's garden." Thence running east 2,500 varas to the boundary of the land of Lorenzo Soto, which boundary is described by the witnesses as a ridge, and not otherwise; and its location by witnesses for plaintiff is consistent with the call for distance on the west course. "Thence running south 2,500 varas to a small peak, where stand two rocks, joined together." The witnesses for defendants testified that they found the small peak and the two rocks called for at the corner marked K on the diagram, whereas plaintiff's witnesses testified that the peak and rocks called for are about a mile farther south, at the corner C on the diagram, and that the rocks and peak at K do not answer the call. On this point the evidence was conflicting; but, since point K answers the call for distance and quantity, and approximates that for course, I think the preponderance of evidence on this question is in favor of the defendants. Thence west 2,500 varas "to a small red hill." Defendants' witnesses professed to have found the "small red hill" at point J on the diagram, while plaintiff's witnesses located it two miles farther west as point B. It was not denied that there was a small hill of a reddish color at point J, but plaintiff's witnesses claimed that it was not so red as that at point B; and, on the other hand, witnesses for defendants claimed that the hill at B was not a small hill, but was a large hill. Considering the great excess over the calls for distance and quantity in extending the south line west to B, I think the evidence fully justified its termination at point J. Thence runs the fourth and last course north 2,500 varas "to the place of beginning on a hill where there is a rock—containing in all one-half of a square league." Plaintiff's witnesses locate this closing point at A, nearly a mile and a half

from the northwest corner of Felipe's garden, which must be accepted as the place of beginning, though it is not on a hill, and no rock answering the call was found within a thousand feet of it, and though the hill on which point A is located has upon it a vast number of rocks scattered over a large area of ground, as testified by the witnesses; since to dispute that one of the boundaries of that garden is the place of beginning from which the first course ran east is to dispute the record of the grant, and to dispute that the northwest corner of the garden is the place of beginning is to dispute the record of the judgment of the United States land commission, and of the United States district court, confirming the grant, by which judgments, as before remarked, the plaintiff is conclusively bound.

Other objections to the location and extent of the west line by the Willey survey are: (1) That it does not close the survey by nearly a mile and a half; (2) to close the survey by running from point A to the garden would make the grant quintangular, instead of a quadrangle, as called for; (3) it incloses more than three times as much land as called for; and (4) the west line is nearly a mile longer than called for. I think it clear that the evidence justified a finding by the lower court that the west boundary line of the grant is not farther west than a north and south line intersecting the northwest corner of Felipe's garden; and, as there is no evidence tending to prove that any one of the defendants ever entered upon or ejected the plaintiff from any land east of said north and south line, the court was also justified in finding, as it did, that none of the defendants ever entered upon or ousted the plaintiff from the premises described in the complaint, or withheld the possession of any part thereof from the plaintiff.

The plaintiff contends, however, that she was in actual possession of land west of the said north and south line, from which the defendants ejected her, and which she is entitled to recover in this action, even though it is not within the boundaries of the Rancho Buena Vista as properly located. For two sufficient reasons this point cannot be sustained: (1) She sued for and described in her complaint only the Rancho Buena Vista; she tendered no issue as to any other land; there was no issue as to any other land tried; and therefore she cannot recover any other land in this action. (2) The evidence does not tend to prove that any one of the defend-

ants entered upon any land while she was in the actual possession thereof, or upon any land within any inclosure. I think the order and judgment appealed from should be affirmed.

We concur: Searls, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order and judgment appealed from are affirmed.

SIMPSON v. SIMPSON.

No. 19,487; September 7, 1895.

41 Pac. 804.

Divorce—Abatement.—The Pendency of an Action by the husband to annul the marriage on the ground that it was contracted under duress does not prevent an action by the wife for divorce on the ground of nonsupport.¹

Divorce—Continuance.—In an Action for Divorce the Affidavit for a continuance stated that defendant, a material witness, was in another state, and too poor to attend the trial, and that his deposition could not be obtained within a month; that the evidence in an action pending in another state by defendant against plaintiff to annul the marriage could not be obtained by the day set for trial. Plaintiff stipulated that the uncertified copy of the evidence in the other action might be used as though duly certified, and waived alimony. Held, a continuance was properly refused.

APPEAL from Superior Court, San Diego County; George Puterbaugh, Judge.

Action by Sarah B. Simpson against B. F. Simpson for a divorce. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

¹ Cited and approved in *Cook v. Cook* (N. C.), 74 S. E. 641, where it is held that a defendant in a divorce proceeding may ask and obtain a divorce as against the plaintiff, the pleading being by way of counterclaim.

Cited with approval in *Sworoski v. Sworoski*, 75 N. H. 3, 70 Atl. 120. Indeed, the court then go further, saying: "The cause alleged in that proceeding is not the same as in this, and, if it were, its pendency in Massachusetts would not be a ground pleadable in abatement of the present action."

Callen & Neale for appellant; William H. Fuller and Clarence L. Barber for respondent.

VANCLIEF, C.—Action for divorce on the grounds of desertion and willful neglect to provide for plaintiff the common necessities of life, in which the judgment was in favor of plaintiff, dissolving the bonds of matrimony. Defendant has appealed from the judgment and from an order denying his motion for a new trial. The alleged defenses to the action were: First, a general denial of each and every allegation of the complaint; second, that the defendant married the plaintiff under duress, by threats of plaintiff's father and brother in law to kill him unless he married plaintiff; third, that there was another action pending in the state of Colorado between the same parties for the same cause.

1. The appellant contends that the findings of fact by the court are not justified by the evidence, but I think the evidence quite sufficient to justify all such findings.

2. It is contended that the court erred in deciding that the action pending in the state of Colorado was not for the same cause as this action. The record of that cause, which was offered in evidence by defendant, shows that it was an action brought by the defendant herein against the plaintiff in this action to annul the alleged marriage of plaintiff and defendant herein, on the ground that the plaintiff in that action submitted to the performance of the marriage ceremony under duress as aforesaid, and was not an action for divorce. Surely, neither that cause of action nor the relief sought thereby was the same as in this action, and the court did not err in so deciding.

3. Appellant contends that the court erred in denying defendant's motion to postpone the trial. The motion was made on the affidavit of one of defendant's attorneys, showing that defendant was a material witness in his own behalf to prove the alleged duress; that he resided in Denver, Colorado, and by reason of his poverty was unable to pay the expense of a trip to this state, and therefore his testimony could be procured only by deposition; that affiant knew of no other witness by whom the alleged duress could be proved; that a postponement of one month would be necessary to enable affiant to procure defendant's deposition, but did not state that affiant expected to procure it within that period. The affidavit

further stated that the evidence necessary to prove the plea of another action pending in the state of Colorado could not be procured in time for the trial on the day set. Counsel for plaintiff opposed the motion to postpone the trial, and offered to stipulate, as they afterward did, that the uncertified copy of the record of the action pending in Colorado, then in possession of defendant's attorneys, might be admitted in evidence without objection, and with the same effect as if duly certified, and also waived plaintiff's claim for alimony. Plaintiff also proved that summons was personally served on defendant in Denver, Colorado, four months prior to the day set for the trial of the case. Considering all the circumstances, I do not think the denial of the motion to postpone the trial was an abuse of the discretion of the court. But, even if it can be said to have been error, I think it appears that the defendant was not injured thereby. In the first place, it appears by the record of defendant's suit in Colorado that he earnestly desired to free himself from the bonds of matrimony, which were dissolved in this action without costs, except the sum of \$20.15, which he will probably never pay. The only difference, in effect, between the decree of divorce in this action and a decree annulling the marriage in his action in Colorado is that the latter would scandalize the plaintiff (to marry whom he appears to have been under the strongest possible moral obligation), and bastardize his natural son, born after the alleged marriage. In the second place, it appears to be hardly possible that defendant's testimony as to the alleged duress could prevail over the strong evidence to the contrary given at the trial. A new trial should not be granted on the ground of harmless error. I think the order and judgment appealed from should be affirmed.

We concur: Haynes, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order and judgment appealed from are affirmed.

McDONALD v. SOUTHERN CALIFORNIA RY. CO.

No. 19,534; September 11, 1895.

41 Pac. 812.

Railroad—Conveyance of Right of Way—Construction.—A conveyance to a railroad company of the right of way for its road, as located, constructed, and operated on the highway in front of the grantor's premises, to wit, on Third street, "for the full length and frontage of lots 23 and 24 in block 25," of a certain survey, and also the right to use "such street" for railroad purposes, with an acknowledgment of payment for "all damages sustained by me by reason of the construction of said railroad upon said street, and by reason of the operation thereof, and particularly . . . for damages for any injury caused by the construction of said railroad in front of my property hereinbefore described," is a grant only of the right of way in front of the two lots; and the damages for which satisfaction is acknowledged are limited to those which had been sustained by construction and operation of the road in front of such lots, and do not apply to damages afterward sustained by reason of a defective bridge on the road, not in front of the lots.

APPEAL from Superior Court, San Bernardino County;
John L. Campbell, Judge.

Action by William McDonald against the Southern California Railway Company for damages to plaintiff's premises, caused by a defectively constructed bridge. Judgment for plaintiff, and defendant appeals. Affirmed.

W. J. Hunsaker for appellant; Paris & Allison and Goodcell & Leonard for respondent.

HARRISON, J.—When this case was here upon the former appeal (101 Cal. 206, 35 Pac. 643, 646) it appeared from the findings that "said bridge and all approaches thereto are located within the right of way in said deed described, and constitute part of the premises thereby granted to the California Central Railway Company"; and it was held that, by virtue of the conveyance from the plaintiff to the predecessor of the defendant, he had given a license for the maintenance of the bridge in the condition it was at the time of the conveyance. The cause was remanded for a new trial, and the

superior court has now found "that, at the time said deed was executed, the bridge described in plaintiff's complaint, and referred to in the evidence, was not, nor was any part thereof, situated upon the lands of the plaintiff described in his complaint, or upon the extension of Third street in front of his lands, but that the eastern abutment of said bridge was situated upon the land of Third street extended westerly about one hundred and fifty feet west of the westerly line of plaintiff's lands." The other facts found by the court being substantially the same as upon the former appeal, judgment was rendered in favor of the plaintiff, and the defendant has appealed.

The appellant still contends that, by reason of the conveyance above referred to, the plaintiff is estopped from a recovery for any damage sustained by reason of the defective construction of the bridge. By that conveyance, the plaintiff, in consideration of the sum of \$750, granted "the right of way for the main track of said railroad, as the same is now located, constructed, and operated in and upon the highway in front of grantor's premises, to wit, in and upon Third street, as extended west from the limits of the city of San Bernardino, for the full length and frontage of lots 23 and 24 in block 25 of the five-acre survey of the Rancho San Bernardino," and also "the right to exercise the right to use such street for railroad purposes, as it is now doing for its main track." To this grant was added the following clause: "I do hereby acknowledge full and entire satisfaction or payment of any and all damages sustained by me by reason of construction of said railroad upon said street, and by reason of the operation thereof; and particularly do I acknowledge payment for damages for any injury caused by the construction of such railroad in front of my property hereinbefore described." The right of way which is thus granted is by its terms limited to "the full length and frontage of lots 23 and 24 in block 25 of the five-acre survey of the Rancho San Bernardino," upon Third street, as extended west from the limits of the city of San Bernardino; and the following clause, granting the right to use "such street" for railroad purposes, has the same limitation. As the plaintiff could not grant a right of way over property that he did not own, and could not grant the right to use a street, except in front of his own property, it is not to be assumed that it was intended that his grant should have

reference to any other property than that which he owned, or to any other street than "the highway in front of grantor's premises," which is described therein. The clause upon which the appellant relies in support of its claim is that in which the plaintiff acknowledges satisfaction of "all damages sustained by me by reason of the construction of said railroad upon said street, and by reason of the operation thereof." We are of the opinion, however, that the "said street" designated in this clause is that portion of Third street which had been previously named in the instrument, and that the damages for which satisfaction was acknowledged were limited to those which had been sustained by the construction and operation of the railroad in front of the plaintiff's property, and which are "particularly" designated in the last clause of the instrument. It would require explicit language to justify the conclusion that it was the intention of the parties that the instrument should apply to damages that the plaintiff might afterward sustain by reason of a defective structure upon the road at a point remote from his land; and for this purpose it is immaterial whether the structure was one hundred and fifty feet or a mile away. It is more reasonable to conclude that the negotiation and compensation were limited to the property respecting which he had the right to bargain, and which is particularly described in the instrument. The judgment and order are affirmed.

We concur: Garoutte, J.; Van Fleet, J.

ANDREWS v. WILBUR.

No. 18,313; September 12, 1895.

41 Pac. 790.

Appeal—Sufficiency of Evidence.—On Appeal from an Order denying a new trial, only rulings of the trial court assigned as error, and the sufficiency of the evidence to sustain the verdict, can be considered.

Appeal.—The Verdict of a Jury on Conflicting Evidence will not be disturbed on appeal.

An Attorney Who Buys His Client's Note at Less Than Its Face value, and then collects from the client its full value, is liable for interest, on the excess of the amount received by him over the amount paid, from the date of its receipt.

APPEAL from Superior Court, Sutter County; E. A. Davis, Judge.

Action by Sarah Andrews against J. L. Wilbur. Judgment for plaintiff. From an order denying his motion for a new trial, defendant appeals. Affirmed.

Wm. G. Murphy and M. C. Barney for appellant; Forbes & Dinsmore for respondent.

HARRISON, J.—It is alleged in the complaint that, while the defendant was acting as the attorney and confidential agent of the plaintiff, he purchased a promissory note and mortgage that had been executed by her to one Wheeler; that, by reason of his position as her attorney, he received information that the note could be purchased for less than its face, and that thereupon he did so purchase it, in violation of the confidence reposed in him by her, and without her knowledge; that afterward he received from her the full amount of said note. The plaintiff therefore asked judgment for the amount received by the defendant from her in excess of the amount paid by him for the note. The case was tried by a jury, who rendered a verdict in favor of the plaintiff. A new trial was asked by the defendant, and denied by the court, and from this order he has appealed.

The sufficiency of the complaint is not involved in this appeal. Upon the appeal from the order denying a new trial, we can only consider the rulings of the court assigned as error, and the sufficiency of the evidence to sustain the verdict. The only ground specified by the appellant, in his statement on motion for a new trial, in which the evidence is insufficient to sustain the verdict, is that the evidence failed to show that at the time of the purchase of the note he held the relation of agent or attorney to the plaintiff. Upon this point it is only necessary to say that this proposition was sharply contested at the trial, and that the main portion of the transcript, containing over one hundred pages, relates to evidence upon this point. The appellant in his brief seeks to show that the ver-

dict should have been otherwise; but, as we are precluded from weighing the testimony, the verdict of the jury thereon must be taken as conclusive.

No exception appears to have been taken to the instructions to the jury, and the rulings of the court upon the admission of evidence, to which objections were made, are not such as to justify a reversal.

The plaintiff was entitled to interest, upon the amount received from her by the defendant in excess of the amount he had paid, from the date of its receipt. It was money in his hands belonging to her, which he had received to her use, and which he detained from her: Civ. Code, sec. 1917. The order is affirmed.

We concur: Van Fleet, J.; Garoutte, J.

MASTERSON v. CLARK, Sheriff.

No. 18,348; September 17, 1895.

41 Pac. 796.

Replevin.—A Complaint in Replevin, Which Fails to state that plaintiff is the owner or is entitled to the possession of the property at the commencement of the action, is defective.¹

APPEAL from Superior Court, Glenn County; Seth Wellington, Judge.

Action by James Masterson, Jr., against P. H. Clark, sheriff of the county of Glenn, to recover the possession or value of

¹ Cited and approved in *Byxbee v. Dewey*, 128 Cal. 324, 60 Pac. 847, where, however, the defendant, after the overruling of his demurrer on this ground, had answered and gone to trial. It was held that he could not raise the point on the plaintiff's motion for a new trial.

Cited and followed in *Holly v. Heiskell*, 112 Cal. 175, 44 Pac. 466, the court saying that "an allegation or right of possession on a prior date is insufficient."

Cited and followed in *Manti City Savings Bank v. Peterson*, 30 Utah, 477, 116 Am. St. Rep. 862, 86 Pac. 414. Although the complaint alleged possession on the second day of September and was filed on the 3d, the demurrer to it was sustained.

certain personal property. Plaintiff had judgment, and defendant appeals. Reversed.

Ben F. Geis for appellant; Charles L. Donohoe for respondent.

PER CURIAM.—The plaintiff brought this action to recover the possession or value of three hundred head of sheep. The complaint was filed September 20, 1893, and it avers that on the eighth day of that month plaintiff was the owner and entitled to the possession of said sheep; that on the said eighth day of September defendant, without plaintiff's consent, and wrongfully, came into possession of said property, and still retains possession of the same; that on the eleventh day of said month plaintiff demanded of defendant the possession of said sheep, but to deliver the possession thereof the defendant refused, and still refuses; that defendant still unlawfully withholds and detains said sheep from the possession of plaintiff, etc. A general demurrer to the complaint was interposed and overruled. The defendant then answered, denying the plaintiff's ownership or right to the possession of the sheep, and setting up facts to justify his taking possession of the same. The case was tried, and the findings and judgment were in favor of the plaintiff. The defendant appeals from the judgment entered against him, and has brought the case here on the judgment-roll alone. The only question presented for decision is, Did the complaint state facts sufficient to constitute a cause of action? It is contended for appellant that the complaint was fatally defective, because it entirely failed to state that the plaintiff was the owner and entitled to the possession of the sheep when the action was commenced. The same question arose in *Fredericks v. Tracy*, 98 Cal. 658, 33 Pac. 750. In that case the complaint was very similar to the complaint in this case, and it was held to be defective, and cause for reversal. On the authority of that case the judgment here appealed from must be reversed, and the cause remanded, with leave to the plaintiff to amend his complaint if so advised. So ordered.

ETTER v. HUGHES et al.

No. 18,402; September 18, 1895.

41 Pac. 790.

Judgment—Entry on a Verdict Against One Defendant Only.—In assumpsit against W. and M., husband and wife, on a verdict "in favor of defendant M. against plaintiff," without mentioning W., judgment was entered that plaintiff take nothing by the action, and that M. recover her costs. Held, that the judgment meant that plaintiff take nothing by his action as against M., and the court was authorized to enter judgment in favor of plaintiff as against W.

APPEAL from Superior Court, Madera County; W. M. Conley, Judge.

Action by A. J. Etter against Matilda B. Hughes and William M. Hughes for the recovery of money. The latter consented that judgment be entered against him, and from a judgment in favor of Matilda B. Hughes plaintiff appeals. Affirmed.

W. H. Larew for appellant; H. H. Welsh for respondents.

BELCHER, C.—This action was brought to recover the sum of \$452.70, alleged to be due from the defendants, who are husband and wife, to the plaintiff, for groceries, drygoods, and general merchandise sold and delivered by him to them at their special instance and request. Defendant William M. Hughes answered, admitting the indebtedness as against himself, and consenting that judgment be entered against him for the amount claimed by plaintiff in his complaint, and all legal costs of the action. Mrs. Hughes answered separately, and denied generally and specifically each and every allegation in the complaint contained. The case was tried before a jury, and the verdict was "in favor of the defendant Matilda B. Hughes against plaintiff," without any mention of the other defendant. On this verdict, judgment was entered that the plaintiff take nothing by reason of the action, and that Mrs. Hughes recover her costs and disbursements incurred in the action. The plaintiff appeals from the judgment on the judgment-roll, without any statement or bill of exceptions.

It was not necessary for the jury to find and return a verdict upon the claim against William M. Hughes. As to that claim, there was no issue, and there could be no trial. And as to him, the court was authorized to enter judgment in favor of the plaintiff upon the pleadings, and it may still do so. "Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants": Code Civ. Proc., sec. 578. The judgment entered, when properly construed, was only that the plaintiff take nothing by his action as against Mrs. Hughes, and that she recover her costs. There is no substantial merit in the appeal, and the judgment should be affirmed.

We concur: Searls, C.; Vanelief, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

Ex Parte WOODS.

Crim. No. 62; September 19, 1895.

41 Pac. 796.

Burglary—Sufficiency of Judgment.—Defendant Pleaded Guilty to a charge of burglary in the first degree, and the judgment recited that, "whereas defendant has been convicted of the crime of burglary in the first degree, . . . it is ordered," etc. Held, that the judgment was valid, though the minutes of the court did not show that any evidence was heard to prove the degree of the crime of which defendant was found guilty, there being nothing in the minutes to contradict the recitals of the judgment.¹

John Woods, convicted of burglary in the first degree, petitioned for a writ of habeas corpus. Petition dismissed.

C. T. Jones for petitioner; H. F. Carter, third deputy, for respondent.

¹ Cited and followed in *Marx v. People*, 204 Ill. 252, 253, 68 N. E. 437. There the record showed that after a plea of guilty the court heard evidence on two separate days and then gave sentence to the reformatory; since, under the statute, the court had no discretion to fix a term of imprisonment, it was presumed to have done its duty and that the evidence taken was as to the age of the defendant.

GAROUTTE, J.—Petitioner was charged by information with the crime of burglary. A prior conviction for a like offense was also alleged against him. He pleaded guilty, and the judgment under which he is held recites that “whereas the defendant, John Woods, has been convicted of the crime of burglary in the first degree and a prior conviction of felony, it is ordered that he be imprisoned in the state prison for the term of twenty years.” The judgment, upon its face, is a valid and legal judgment, and one which the court clearly had power to make; but petitioner insists that the minutes of the court taken at the time defendant pleaded, and also when judgment was pronounced, fail to indicate that any evidence was heard tending to show the degree of the crime of which defendant was found guilty. There is nothing in the point. The judgment itself recites that the defendant was convicted of burglary of the first degree; and, conceding that the minutes of the court could be introduced upon this hearing for the purpose of contradicting recitals found in the judgment, still we find nothing in those minutes of a contradictory character. They are silent upon the question, and under such circumstances recitals in the judgment that the petitioner was convicted of the crime of burglary in the first degree must control. We see no ground entitling the prisoner to his discharge. The petition is dismissed, and petitioner remanded.

WELLS v. SNOW et al.

No. 18,419; September 20, 1895.

41 Pac. 858.

Nonsuit.—Where There is Evidence to Sustain a Material Issue for plaintiff, a motion for a nonsuit is properly denied.

Appeal.—A Finding of Fact by the Court will not be Disturbed where there is a substantial conflict in the evidence.

New Trial.—Newly Discovered Evidence, Merely Cumulative in character, is not ground for a new trial.

APPEAL from Superior Court, Fresno County; J. R. Webb, Judge.

Action by B. C. Wells against W. N. Snow and another. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

G. C. Freeman and F. H. Short for appellants; George B. Graham for respondent.

SEARLS, C.—This action is brought to recover \$400, for so much money alleged to have been had and received by the defendants for the use of plaintiff. Plaintiff had judgment for \$350, interest, and costs, from which judgment, and from an order denying their motion for a new trial, defendants appeal. On the second day of September, 1892, W. N. Snow and Mrs. W. N. Snow, his wife, as parties of the first part, entered into a written agreement with B. C. Wells, the plaintiff and respondent herein, by the terms of which, in consideration of \$13,000, they agreed to sell to said Wells a certain tract of land and certain personal property thereon situate, in Fresno county, California, payments to be made by said Wells as follows: \$400 down, the receipt of which is acknowledged; \$4,000 on or before January 1, 1893—possession to be given to Wells upon said payment of \$4,000. The residue of the payments were to be made as follows: \$2,600, January 1, 1894; \$3,000, January 1, 1895, and \$3,000 on January 1, 1896—with interest on all deferred payments except that of January 1, 1893, at eight per cent per annum. B. C. Wells failed to pay the sum of \$4,000 on the 1st of January, 1893, and has never paid or offered to pay any portion of the purchase price of the land except said sum of \$400 paid at the date of the contract.

This action is brought upon the theory that the contract was rescinded by agreement of the parties, and hence that the action will lie against defendants for money had and received by them for the use of plaintiff. The answer denied all the allegations of the complaint; set up the agreement to convey, the failure of plaintiff to make payment or to comply with the terms of the contract, and averred their willingness and readiness to comply with all the terms and conditions thereof; set up a counterclaim for \$400 on account of goods, wares and merchandise sold and delivered to plaintiff by the defendants; and, by way of cross-complaint, set out the contract, averred the breach thereof by plaintiff, averred their readiness to

comply, and averred damages in the sum of \$2,000, etc. The cause was tried before the court, without the intervention of a jury. At the trial the only question of any importance litigated related to the issue of the rescission of the contract; and, upon the close of plaintiff's testimony, defendants moved for a judgment of nonsuit, which was denied, and the ruling is assigned as error.

There is no claim of the failure of title, of fraud or mistake, or any other cause entitling plaintiff without the concurrence of defendants to rescind the contract. That the plaintiff was unable to make and failed to make the payment of \$4,000 due in January, 1893, is admitted by all the testimony, and that the defendants were in no wise in default is equally clear. The whole case, therefore, turns upon the question as to whether or not there was an agreement or consent on the part of the defendants that the contract should be rescinded. The finding of the court is "that on the second day of January, 1893, said plaintiff and said defendants did mutually agree to abandon and rescind said contract, and all of said parties have from hence hitherto treated said contract as abandoned and rescinded; but said \$400, nor any part thereof, has ever been returned or repaid to plaintiff by said defendants or any other person." There was some evidence on the part of plaintiff going to sustain the issue as to rescission of the contract. The motion for a nonsuit was therefore properly denied.

The evidence, taken as a whole, upon the question of rescission, is not altogether satisfactory; but, as it involved a substantial conflict, we are not at liberty to interfere with the action of the court below by setting aside the finding.

The newly discovered evidence, as disclosed by the affidavit of L. E. Walker, is contradicted by the affidavit of the plaintiff, and, if not so contradicted, is cumulative to the testimony adduced at the trial, and hence does not call for a reversal.

The judgment and order appealed from should be affirmed.

We concur: Belcher, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

McCARTY v. OWENS et al.

No. 18,451; September 20, 1895.

41 Pac. 861.

Assignment of Contract.—In an Action Against the Assignee of a paving contract for material furnished, it appeared that the assignment was absolute on its face; that, after the assignment, the assignees kept no account with the assignor; that they furnished all other materials not furnished by plaintiff, paid the bills, and received pay for the work, and stated in a verified complaint to collect an assessment for the work that they became and were, by assignment, contractors to perform the work. Held, that plaintiff could recover.

APPEAL from Superior Court, San Joaquin County; J. K. Law, Judge.

Action by M. McCarty against F. J. Owens and his assignee for the purchase price of materials furnished. From a judgment for plaintiff, and an order denying them a new trial defendant assignees appeal. Affirmed.

James A. Loutitt for appellants; F. H. Gould and James H. & J. E. Budd for respondent.

BELCHER, C.—On September 12, 1892, the defendant F. J. Owens entered into a contract with the superintendent of streets of the city of Stockton to pave a portion of Channel street in that city with bitumen and basalt blocks. On September 22, 1892, Owens assigned his said contract to the defendants Girvin, Baldwin and Eyre, and the assignment appeared on its face to be absolute. The work under the contract was performed, and Owens superintended it, but Girvin, Baldwin and Eyre kept the books, furnished the materials, paid the bills, and received the moneys paid on account of the work. They also instituted suits against property owners to collect assessments alleged to be due them for work done under the contract. Plaintiff furnished basalt blocks, bitumen, curbing, tools, labor, etc., used in performing the contract, and in December, 1892, he commenced this action against Owens to recover the value of the same, alleged to be \$1,371.63. In April, 1893, by leave of the court, he filed an amended complaint, making Girvin, Baldwin and Eyre parties defend-

ant, and alleging joint liability on the part of the defendants. The complaint contained eight separate causes of action, briefly stated as follows: (1) For basalt blocks sold to defendants, \$365.04; (2) for money loaned to defendants, \$118; (3) for money paid for use of defendants, \$114.89; (4) for services rendered by plaintiff, \$95; (5) for balance on assigned claim for services, \$113; (6) for curbing and corners sold to defendants, \$369.60; (7) for bitumen sold to defendants, \$99.75; (8) for planking and use of tools furnished defendants, \$96.35. Judgment was asked against the defendants for the aggregate sum of \$1,371.63. Defendant Owens did not appear. The other defendants answered, denying their liability for each and all of the claims set up in the complaint. The case was tried before a jury, and a verdict was returned in favor of plaintiff for \$400, on which judgment was entered. The defendants Girvin, Baldwin and Eyre moved for a new trial, which was denied, and then appealed from the judgment and order.

Appellants contend that the verdict was not justified by the evidence, and hence their motion should have been granted. This contention is based upon the assumed fact that Owens assigned his contract to them merely as security for advances made and to be made by them to him, and that all materials, etc., furnished by plaintiff were furnished to Owens solely on his individual account and responsibility; and in support of their claim that, under such circumstances, they cannot be held liable, they cite the case of *Stone v. Owens*, 105 Cal. 292, 38 Pac. 726. In the case cited the assignments were expressly made as security for advances made and to be made by the assignee to the assignors, and the parol evidence was positive, without conflict, that the assignee had nothing to do with the work performed under the contracts; that he neither directly nor indirectly employed or discharged any laborer, or paid for any part of such labor. He paid orders or checks drawn on him by the assignors, but charged the amount so paid to them. That case is not in point here unless the theory of appellants as to the character of the assignment to them is sustained by the evidence, and whether it is or not is the principal question to be considered. As before stated, the assignment to appellants was absolute in form, and it was proved that, after the assignment, they kept no account with Owens. The account appeared on their books as the "Chan-

nel Street Contract." They furnished all the materials except that furnished by the plaintiff, paid all the bills, and received all the moneys paid on account of the work. And, in one of the suits instituted by them to collect an assessment for work done under the contract, they stated, in their verified complaint, "that on the twenty-second day of September, 1892, the said F. J. Owens, in writing and for value, transferred and assigned the aforesaid contract, and all his rights and claims thereunder, to these plaintiffs, who then became, hence hitherto have been, and now are, the assignees of said F. J. Owens, and contractors for the doing and performing of said work by assignment, as aforesaid." The facts proved, as above stated, were clearly sufficient to distinguish this case from that of *Stone v. Owens*, supra; and, while there was a conflict in the evidence, it was, in our opinion, quite sufficient to justify the jury in finding that appellants were liable to the plaintiff for at least as large a sum as that named in the verdict. The judgment should, therefore, not be reversed for want of evidence to support the verdict. Objection is made to some of the instructions given to the jury, but it is based upon the theory that appellants held the contract only as security, and therefore the instructions were misleading and erroneous. As we view the case, we see no error in the instructions complained of. They seem to have stated the law applicable to the questions before the jury very fully and fairly. The judgment and order should be affirmed.

We concur: Searls, C.; Vancief, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

SHARP v. FRANK.

No. 18,359; September 21, 1895.

41 Pac. 860.

Trial—Findings—Indefiniteness.—Where, in an Action to Quiet Title, involving the question whether a conveyance to plaintiff was with intent to delay or defraud creditors (declared in such case by Civil Code, section 3439, to be void), the jury returned answers to

interrogatories, which the court adopted, subject to its findings of fact, such findings to govern in case of conflict with the answers, and the jury found that plaintiff's husband conveyed the property to her to prevent defendant from satisfying his claim against him, that plaintiff knew her husband was insolvent, and that he made the deed to plaintiff with intent to hinder and delay, but not to defraud, defendant; and the court found that the deed to plaintiff was not executed "with a view to conceal his property from defendant or his other creditors, nor improperly to hinder or delay them"—the findings will be held too indefinite to support a judgment for plaintiff.

APPEAL from Superior Court, Fresno County; W. M. Conley, Judge.

Action by Francis W. Sharp against F. A. Frank. Judgment for plaintiff. Defendant appeals. Reversed.

Sayle & Coldwell for appellant; F. H. Short and W. H. Larew for respondent.

SEARLS, C.—This is an action to quiet the title of plaintiff to an undivided third interest in and to lots 8, 9, and 10, in block 40, situate in the town of Madera, county of Madera, state of California. The cause was tried before a jury, and written answers returned to certain special issues and interrogatories propounded to them, which the court approved and adopted, and, in addition thereto, made and filed certain other findings of fact and its conclusions of law thereupon, upon which a decree was entered quieting the title of plaintiff, and decreeing the defendant to have no right, title, estate, or interest in or to the said lots of land and premises, or in or to any part thereof. Defendant appeals from the judgment, and from an order denying his motion for a new trial.

The plaintiff, a married woman, claims title by deed executed to her by her husband, L. O. Sharp, on the eighteenth day of October, 1892. Defendant claims title as a judgment creditor of the said L. O. Sharp, and under an execution, levy, sale, certificate of sale and sheriff's deed of said property, and asserts that the deed executed by L. O. Sharp to his wife, the plaintiff here, was and is void as to him, because the same was made with intent to hinder, delay, and defraud him of his claim as a creditor against L. O. Sharp. Some forty interrogatories were propounded to the jury, to which answers were returned. The court, having considered the

special verdict as rendered by the jury, entered an order that it "does hereby adopt the same, and approve the same, and the same are hereby made the findings of the court, subject only to the findings of fact and conclusions of law hereinafter set forth and specified; and wherein, if in any particular, said answers of said jury vary or differ from findings of the court, the findings of the court shall govern, and said answers are hereby modified to that extent, and to that extent only." The court then proceeded to make additional findings, some of which are in accord with those already found by the jury, others of which conflict to an uncertain extent with those of the jury, and still others are antagonistic to those of the jury. The result of all this constitutes a jumbled mass of uncertainties from which no intelligent legal conclusions can be drawn. To illustrate: The jury found, in substance, that L. O. Sharp conveyed the property to the plaintiff for the purpose of preventing the defendant from satisfying his claim against him; that plaintiff knew her husband was insolvent and unable to pay his debts; that the deed from L. O. Sharp to the plaintiff was made with intent to hinder and delay, but not to defraud, defendant. Upon this question the court found that the deed to plaintiff was not executed by L. O. Sharp "with a view to conceal his property from defendant or his other creditors, nor improperly to hinder or delay them." Every transfer of property "with intent to delay or defraud any creditor or other person of his demands is void against all creditors," etc.: Civ. Code, sec. 3439. What the court below meant by the term "improperly to hinder or delay" is not clear. The findings, taken together, are as indefinite as those held insufficient in *Warren v. Robinson*, 71 Cal. 380, 12 Pac. 265, *Ladd v. Tully*, 51 Cal. 277, and *Hardenberg v. Hardenberg*, 54 Cal. 591. We have no means of determining what the court deemed an improper hindrance or delay of creditors, and hence cannot say how far it tended to modify the finding of the jury that the deed was executed to hinder and delay such creditors. The proper course would have been to set aside and annul such of the findings of the jury as failed to meet the approbation of the court, and then to find upon the issues thus left at large. The judgment and

order appealed from should be reversed, and a new trial ordered.

We concur: Britt, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are reversed and a new trial ordered.

PEOPLE v. SHORT.

No. 21,196; September 23, 1895.

41 Pac. 862.

Criminal Law—Review.—Where No Brief is Filed, a conviction will be affirmed if it appears that the evidence sustains the verdict, and no exception was taken to any ruling of the court.

APPEAL from Superior Court, City and County of San Francisco; William T. Wallace, Judge.

Orville B. Short was convicted of forgery, and appeals. Affirmed.

Geo. Hayford for appellant; W. F. Fitzgerald, attorney general, for the people.

BELCHER, C.—The defendant was charged with the crime of forgery, and on his arraignment pleaded guilty as charged. That plea was subsequently withdrawn, and a plea of not guilty entered. The case was tried, and the only defense interposed was that of insanity. The verdict was: "We, the jury, find the defendant guilty as charged, and so say we all." A motion for new trial was made and denied, and thereupon judgment was entered that the defendant be punished by imprisonment in the state prison for the term of six years. From that judgment the defendant appeals, but no brief has been filed in his behalf or on behalf of the people. We have examined the record, and find in it no ground for a reversal. The evidence was amply sufficient to justify the verdict, and the instructions of the court to the jury were full and fair, and stated the law applicable to the case cor-

rectly. It does not appear that any exception was taken to any of the rulings of the court. The judgment should be affirmed.

We concur: Vanciel, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

CASTLE et al. v. HICKMAN et al.

No. 18,391; September 28, 1895.

41 Pac. 1036.

Pledge—Insurance Policy.—The Delivery by the Payee of a note, to the maker thereof, of a life insurance policy held by him as security for the payment of the note, which delivery was conditioned on the return of a paid-up policy to be thereafter issued, does not divest such payee of his lien on the security.

Trial—Findings.—Failure of the Court to Make a finding is not reversible error, in the absence of a showing that there was evidence to justify a finding.

Pleading—"Written Instrument."—A Copy of a Decree of Discharge in insolvency is not a "written instrument," within Code of Civil Procedure, section 448, providing that "when the defense to an action is founded on a written instrument, and a copy thereof is contained in the answer, the genuineness and due execution are deemed admitted, unless the plaintiff file an affidavit denying the same."

APPEAL from Superior Court, San Joaquin County; Ansel Smith, Judge.

Action by George H. Castle, Jr., and others, as executors of the last will and testament of George H. Castle, deceased, against Edward Hickman and others. Judgment for plaintiffs. Defendants appeal. Affirmed.

J. G. Swinnerton and White & Dunlap for appellants; Nicol & Orr and F. T. Baldwin for respondents.

HARRISON, J.—The defendants, Edward Hickman and Hepsabeth Hickman, his wife, executed their promissory note to George H. Castle, February 23, 1889, for the sum of

\$4,343, and on the 22d of April, 1890, for the purpose of securing the same, assigned to him a certain policy of insurance that had been issued by the Equitable Life Assurance Society, payable to Edward Hickman. In January, 1891, Edward Hickman was desirous that the policy should be surrendered for a paid-up policy, and thereupon he and Castle made an agreement to that effect, and that the paid-up policy, when issued, should be held by Castle in lieu of the other, and with like effect and purpose. The policy was thereupon delivered to Hickman, and the insurance company was directed by him to issue therefor a paid-up policy, and, when issued, to forward it to Castle's attorney. The company made the paid-up policy payable to the defendant Hepsabeth Hickman, and, in case of her death, to her children, and, instead of forwarding the policy to Castle's attorney, forwarded it to Hickman, who afterward delivered it to the attorney. The present action was brought by the executors of Castle to obtain judgment for the amount of the promissory note, and declaring that the claim of the defendants upon the paid-up policy is subordinate and subject to the claim of the plaintiffs therein. Judgment was rendered in favor of the plaintiffs, and the defendants have appealed.

It was shown at the trial that the defendant Hepsabeth signed the promissory note as an accommodation to her husband, subsequent to its execution by him, and that her assignment of the policy was without any consideration. She claimed in her answer that her husband had previously agreed that he would hold the policy as a security for the payment of certain money that he had borrowed from her, and that, when he exchanged it for the paid-up policy, the latter was made payable to her for the purpose of carrying out this agreement, and that its subsequent delivery by him to Castle was without her knowledge. At the trial, however, after the plaintiffs had produced the assignment of the original policy executed by her, she testified that she executed it at the request of her husband, who informed her that Castle wanted it as security for the note that had been made to him. There was no evidence that the policy had ever been assigned by her husband to her, and the only evidence in support of her claim to it as security for her husband's debt was her statement that he had made a verbal promise to give it to her; but there was no evidence that he had ever carried out his agree-

ment with her. She testified that, when she signed the assignment, she thought it was of another policy, but she also testified that she did not read the assignment, although it was placed in her hands. Nor did she testify that her husband had made any misrepresentation of the contents of the instrument when he asked her to sign it. Her testimony on this subject is as follows: "The paper my husband wanted me to sign was given to me. He did not tell me not to read it. He did not tell me about the contents of it. He said Mr. Castle wanted more security. I signed it because I was willing to give him more security. I was willing to aid my husband in giving Castle more security. I was desirous that Mr. Hickman should make such arrangements as might be satisfactory to Mr. Castle at the time. I signed this paper, of course, at his request." The court found that the assignment by her to Castle was not executed by mistake, or without any intention to assign it to him, and that it had not at any time prior thereto been assigned or pledged with her as security for any debt of her husband. The testimony before the court was ample to support these findings, and, upon the facts thus found, the court was authorized in holding that her claim to the policy is subordinate to that of the plaintiffs.

The agreement between Castle and Hickman that the paid-up policy should be held "in lieu of the other" gave Castle the same right to it as security for Hickman's note as if the paid-up policy had been originally delivered to him. The delivery to Hickman, for the purpose of procuring a paid-up policy to be issued in lieu thereof, did not divest the lien under which it was held by Castle: *Palmtag v. Doutrick*, 59 Cal. 154, 43 Am. Rep. 245; Civ. Code, sec. 2913. Whether the paid-up policy was issued in favor of Mrs. Hickman by the direction of Mrs. Hickman, or without any directions, is immaterial. Mrs. Hickman testified that it was done without her knowledge, and there was no evidence that any directions upon the subject had been given to the company. The fact, however, that it was so issued without the consent of Castle, is all that it was necessary for the plaintiffs to show.

The failure of the court to find upon certain issues does not constitute a reversible error. It does not appear that there was any evidence in support of the affirmative defense of Edward Hickman, and it has been frequently held that it is

not error for the court to omit to make a finding, unless it shall be made to appear that there was evidence which will justify such finding. The copy of the decree of discharge in insolvency, which is set forth in his answer, is not a "written instrument," within the meaning of section 448 of the Code of Civil Procedure.

We find no error in the record and the judgment is affirmed.

We concur: Van Fleet, J.; Garoutte, J.

STEINHART et al. v. COLEMAN.

No. 15,979; October 4, 1895.

41 Pac. 1098.

New Trial.—Where There is a Substantial Conflict in the evidence, an order denying a new trial will not be disturbed.

Evidence.—Error in Admitting Testimony is Harmless where the party complaining testified to the same facts.

APPEAL from Superior Court, City and County of San Francisco; Walter H. Levy, Judge.

Action by William Steinhart and others against L. C. Coleman. Plaintiffs had judgment and defendant appeals. Affirmed.

Thos. F. Barry for appellant; Rothchild & Ach for respondents.

PER CURIAM.—This is an action to recover from the appellant, Coleman, a certain amount of money, the same being an indebtedness from Peyser & Bro. to plaintiffs, and assumed by Coleman. The appeal is by Coleman from the judgment, and also from the order denying his motion for a new trial. It is insisted that the evidence fails to support the findings as to the assumption by Coleman of the aforesaid indebtedness. As to such contention, it is sufficient to say that there is a material and substantial conflict in the evidence upon this question of fact, and it follows that upon such grounds we will not disturb the order denying a new trial.

Regarding the statements of Steinhart as to the declarations made by Coleman, if it be conceded that there was error in their admission as evidence, it was harmless error, for Coleman himself testified in effect to the same matters. For the foregoing reasons, the judgment and order are affirmed.

DE LA CUESTA v. CALKINS et al.

No. 19,588; October 9, 1895.

41 Pac. 1098.

Appeal—Dismissal—Notice.—A Motion to Dismiss an appeal cannot be considered where it is uncertain to which of two notices of appeal it is directed.

APPEAL from Superior Court, Santa Barbara County;
W. B. Cope, Judge.

Motion to dismiss an appeal. Denied without prejudice.

Garber, Boalt & Bishop and Boyce, Taggart & Wheeler for appellants; Wright & Day for respondent.

PER CURIAM.—A motion has been made to dismiss “the appeal” herein upon the ground that it has not been perfected in accordance with the provisions of the code. The transcript upon record contains a notice of two appeals, one from the judgment and another from the order denying a new trial. As the sufficiency of each of these appeals does not depend upon the same considerations, it is uncertain to which appeal the notice of the present motion is directed, and the motion is therefore denied, without prejudice to its renewal at the hearing of the cause.

STOCKTON SAVINGS & LOAN SOC. v. PURVIS, Sheriff.*

No. 18,386; October 9, 1895.

42 Pac. 441.

Pledge of Crops for Rent—Creditors of Lessee.—An oral agreement between landlord and tenant that title to crops raised during the term should remain in the landlord, and that the crop was to be put in warehouse in the landlord's name, and that from a sale thereof the landlord was to retain as rent an amount equal to the rent reserved in the lease, and turn over the balance to the tenant, is merely an agreement that, after the crop was harvested and stored, it should become a pledge for payment of the rent, and does not create a lien which would support an action of conversion against a sheriff for levying on the crop while growing, and seizing it under attachment against the tenant as soon as harvested.

APPEAL from Superior Court, Stanislaus County; William O. Minor, Judge.

Action by the Stockton Savings & Loan Society against R. B. Purvis, sheriff. Judgment for plaintiff and defendant appeals. Reversed.

H. G. W. Dinkelspeil and Stonesifer & Needham for appellant; Nicol & Orr for respondent.

HAYNES, C.—Action for the conversion of seventeen hundred and seventy sacks of wheat. The case was tried by the court, and findings and judgment were against the defendant, who appeals from the judgment upon the judgment-roll alone.

The findings show the following facts: Plaintiff, a corporation, was the owner of certain lands in Stanislaus county, and orally leased the same to one Dallas for the term of one year at a cash rental of \$2,140. That it was further orally agreed and understood between the lessor and lessee "that the title to said crops raised thereon during said term was to remain in said plaintiff, it being agreed and understood that the said crop was to be hauled to the nearest warehouse, and stored in the name of the plaintiff herein; that from the sale of said crop plaintiff was to receive as rent, as aforesaid, the sum of

*For subsequent opinion in bank, see 112 Cal. 236, 53 Am. St. Rep. 210, 44 Pac. 561.

\$2,140 cash, and the overplus, if any, was to go to and be the property of said R. Dallas; . . . and that no part of said crop should be in any way subject to the disposal of said Dallas." Under this oral agreement Dallas sowed the lands to wheat and barley with his own personal means, and received no advances of any kind from or through the plaintiff. Before the crop was harvested, Eppinger & Co. brought suit against Dallas and wife to recover the sum of \$8,935.77, and caused a writ of attachment to be issued therein, and the defendant, as sheriff of said county, levied said writ upon the whole of the crop of wheat then growing upon said lands, and, after harvesting and sacking the same, removed it from said lands, and refused to deliver it to the plaintiff herein upon demand. Eppinger & Co. in due time obtained judgment against Dallas. The value of said wheat, after deducting the expense of harvesting and sacking, was found to be \$1,417.56, and for that sum judgment was rendered for the plaintiff.

Appellant contends: First, that the plaintiff had no such title to or lien upon the wheat as would defeat the attachment; and, second, that the claim or demand served by the plaintiff upon the sheriff was insufficient in several particulars, and did not comply with the requirements of section 689 of the Code of Civil Procedure, as amended in 1891 (Stats. 1891, p. 20). The tenant, under the terms of the agreement above stated, was the owner of the crop at the time it was attached. "A tenant for years or at will, unless he is a wrongdoer by holding over, may occupy the buildings, take the annual products of the soil, [and] work mines and quarries open at the commencement of his tenancy": Civ. Code, sec. 819. The rent reserved in this case was not a share of the crop, whereby the landlord would have been a tenant in common with his lessee in the crops, and so in possession by his cotenant; but it was a money rent at a fixed sum, not even dependent upon the value of the crop. If the crop had been a total failure, or had been consumed by fire, Dallas would still have been liable for the stipulated sum of money as rent. In *Farnum v. Hefner*, 79 Cal. 575, 582, 12 Am. St. Rep. 174, 21 Pac. 955, it is said: "It is undoubtedly true, as contended, that the landlord and tenant may, by agreement, provide that all of the crops raised upon the land may be delivered to and remain the property of the landlord and be disposed of by him, and such agreement will protect the title of the landlord

in the property as against an attaching creditor of the tenant. But it will be found, upon an examination of the cases cited by counsel, that in every instance where such an agreement is upheld it is made for the protection of the landlord in case of advancements by him, or for some other reason; in other words, there is some consideration shown for the agreement by which the title remains in the landlord." It may be further remarked that we find no case in which a verbal agreement is given the force and effect contended for by plaintiff. Besides, the claim or demand served by plaintiff upon the sheriff does not claim ownership of the wheat, or that it had any title thereto, but its claim was that said crops "were and are now subject to the lien of said Stockton Savings and Loan Society for rent reserved to the amount of \$2,140, and that said Stockton Savings and Loan Society was, at and prior to the time of your attachment, and is now, entitled to the possession of the whole of said harvested crop for the satisfaction of the said sum of \$2,140, secured by such lien."

It is conceded by plaintiff that the statute gives no lien for rent reserved; nor was the alleged lien of plaintiff created by a mortgage of the crop, because a crop mortgage, though authorized by statute, cannot be created by a verbal agreement, or otherwise than as provided by law. At the most, it was an agreement that when the crop should be harvested and stored, it should then become a pledge for the payment of the rent; and, as this agreement to pledge the wheat had not been executed, the wheat was subject to attachment in the action of Eppinger & Co. v. Dallas. This conclusion, we think, is fully supported by *Hitchcock v. Hassett*, 71 Cal. 331, 12 Pac. 228.

Counsel for respondent have cited several cases which should receive attention. These cases are cited to the proposition that the agreement between the landlord and tenant may be so formed as to secure to the owner of the land the ownership of the products until the performance of a stated condition. This proposition need not be disputed, provided it be understood that the agreement in question is in such form as to effect the ends stated. In *Howell v. Foster*, 65 Cal. 169, 3 Pac. 647, there was a written instrument by which the plaintiff leased and demised the land to Mayfield for a certain term, with a covenant, among others, on the part of Mayfield, that he would till land, etc., and at the proper time

would harvest and sack the grain, and thereupon deliver all of it to plaintiff, to be held by him as security for all advances made by the plaintiff to Mayfield; and said instrument further provided as follows: "And it is mutually covenanted and agreed that until such delivery and transfer by the party of the first part [plaintiff] all of said grain shall be the property of the said party of the first part, and the said party of the second part [Mayfield] shall have no right to dispose of any portion thereof." That case, as reported, does not disclose whether the lease was recorded, but the fact that it was in writing, and that it was to be security for advances, does appear; and, as the landlord was to have a portion of the crop, whereby he became a tenant in common with the lessee in the crop, and through his cotenant was in possession thereof, the distinction between that case and this is apparent.

The next case—*Wentworth v. Miller*, 53 Cal. 9—is not in point, as in that case the lessee agreed to pay the lessor a part of the crop as rent, and to give the lessor possession of the whole crop until the rent should be paid, so that in that case also the landlord was a tenant in common with the lessee in the crop, and in possession by his cotenant. The same distinction also exists between this case and that of *Sunol v. Molloy*, 63 Cal. 370.

In *Blum v. McHugh*, 92 Cal. 497, 28 Pac. 592, there appears to have been a written lease. At all events, no case is cited where a verbal lease, with an agreement, also verbal, for a lien upon the crop to secure the money rent, has been held to be valid without possession taken by the landlord.

The agreement between the lessor and lessee did not even give the lessor a right of entry to take the crop; nor was there any provision in the verbal lease giving the lessor the right to the possession of the crop until it was stored in the warehouse in the name of the lessor. There was no provision for a re-entry. The only express condition which could be broken by the lessee was that which required the grain to be stored in the name of the lessor. A growing crop is necessarily in the possession of the party who is in possession of the land, whether he be the owner or the lessee; and, in the absence of a statute authorizing a mortgage of the crop independently of the land, it is difficult to see how such a lien can be vested in one not in possession of the land as will authorize him

to pursue an action at law against one who takes the property. That such a lien may be created by a provision in the lease which is, in legal effect, a chattel mortgage, seems to be conceded by the great weight of authority; but in such case it is generally held to be necessary that the lease be recorded or filed as such mortgage—in the absence of any statute giving effect to the lien—in order to make it effectual against purchasers and creditors; but whether recording is necessary in this state need not be decided, since no case, here or elsewhere, that has been called to my attention, holds that a verbal agreement will create a lien in favor of the landlord which is valid against subsequent purchasers or creditors, unless he has obtained possession of the property upon which the lien was to operate. The judgment should be reversed, with directions to the superior court to dismiss the action.

We concur: Britt, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment appealed from is reversed, with directions to the court below to dismiss the action.

In re FISHER'S ESTATE.

No. 18,368; October 10, 1895.

42 Pac. 237,

Accounting by Administrator—Who may Question Allowances.—An administrator, in settling his accounts, presented a voucher signed by deceased's widow for payments alleged to have been made her in pursuance of an order granting her a certain amount as a family allowance. Held, that a creditor of the estate could not object to the allowance of the voucher as a credit on the ground that the amount covered by it had not been actually paid the widow.

APPEAL from Superior Court, San Joaquin County; Ansel Smith, Judge.

In the matter of the estate of Hiram Fisher, deceased. Appeal by S. C. Fisher, administrator, from an order settling his account. Modified.

Elliott & Elliott for appellant; Louttit, Woods & Levinsky for respondent.

HAYNES, C.—A creditor of the estate, whose claim had been allowed and approved by the court, filed several exceptions to the first annual account of the administrator. Several of these exceptions were confessed by the administrator, and after a hearing the court made the following record (omitting formal preliminary matter): "Now, after having considered said account and report, the objections to the same, and the evidence, the court finds that the amount of money received by said administrator during the time covered by said account and report to be the sum of \$2,623.50, and the amount properly paid out and expended by him as such administrator, and for which he should receive credit against said estate, to be \$2,207.59, leaving a balance in his hands in favor of said estate of \$415.91, and with all property of said estate that has come into his hands and remaining undisposed of. It is therefore ordered that said account, after making the corrections and reductions proper to be made, shows a balance in his hands, of cash, \$415.91, and the same is hereby settled, allowed, and approved." From this order the administrator appeals.

The amount received by the administrator, as shown by his account, was not changed by the order. Items excepted to, amounting to \$75.75, were admitted by the administrator upon the hearing to be erroneous or unauthorized. His account as filed showed a balance due him from the estate of \$148.10. Adding to this the amount found by the court to be in his hands, namely \$415.91, showed a total reduction of credits amounting to \$564.01. Deducting from this sum the items admitted by the appellant to be erroneous or unauthorized, namely \$75.75, leaves the sum of \$488.26 taken from his credits by the court. The order made by the court does not show what items amounting to this sum were disallowed, but the bill of exceptions and the briefs of counsel make it reasonably clear that that sum was deducted from the item of \$950 claimed by the administrator as a payment on account of "family allowances."

On June 16, 1893, the court made an order that the administrator pay the widow of decedent the sum of \$50 per month as a family allowance, "commencing on the twenty-fourth day of November, 1891." The voucher for said item of \$950,

signed by the widow, was for nineteen months, commencing November 24, 1891, and ending June 24, 1893. The administrator was sworn and examined touching this item, and admitted that it had not all been paid to the widow; that some moneys had been advanced by him to her prior to the allowance; that other sums were paid to her after the allowance was made; and that at her request the remainder was retained by him to be paid out to or for her as the same should be required. His examination was contradictory and uncertain as to payments made, both as to time and amount, and nothing like a definite and accurate statement of the facts as to the amount paid or remaining unpaid can be arrived at from his examination. The question, however, is presented (and it is the only one noticed by counsel or which appears to be involved in the case), whether a creditor, or anyone save the widow, can attack or question the voucher signed by her. That the order for the payment of an allowance of \$50 per month was made was not disputed. That this order has not been modified or vacated is not claimed; and the amount claimed to have been paid thereunder and represented by the voucher of the widow does not exceed the amount so allowed. As between the widow and the creditors of the estate, she is undoubtedly bound by her voucher, and could not be heard afterward to say that she had not received the amount therein admitted to have been paid. She must have had legal notice of the settlement of the amount; and, not having objected, she is bound by the adjudication upon that account so far as affects the estate. Whether she would be bound by her receipt, as between her and her son, who is the administrator, need not be considered. This allowance is a preferred claim against the estate, though where the estate is insolvent it cannot be allowed for a longer period than one year after granting letters testamentary or of administration; but where the estate is solvent, it may be allowed during the progress of the settlement of the estate: Code Civ. Proc., sec. 1466. The creditor excepting to said account as to this item alleged that it was "claimed by said account" that the estate was insolvent, and, if insolvent, that the allowance should not be paid for a greater period than one year; so that the question as to whether the estate was insolvent or not appears to have been brought to the attention of the court, and, as no order was made upon that point, we cannot assume that the estate was

in fact insolvent. However, the account filed by the administrator does not show that the estate is insolvent, but merely shows that the amount paid out exceeded the amount received by the administrator. The examination of the administrator touching this item was had over his objection, and the ruling of the court thereon was duly excepted to; so that the question made by appellant is made upon the admission of evidence as well as upon the final order of the court.

I think the full amount of said voucher, viz., \$950, should have been allowed the administrator as a credit upon his account, and that the order appealed from should be modified accordingly, but without costs to either party.

We concur: Vanciel, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the order appealed from is reversed, with directions to modify the same in accordance with the foregoing opinion, and as so modified that it be affirmed.

HEALEY v. NORTON.

No. 15,938; October 11, 1895.

41 Pac. 1080.

Trial.—A Finding That All the Allegations of the complaint are true, and all the allegations of the answer untrue, is sufficient.

APPEAL from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by C. S. Healey against William H. Norton on promissory notes. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Ash & Mathews for appellant; James H. Creeley for respondent.

PER CURIAM.—Action against the defendant, an indorser, on three promissory notes. The complaint was unverified, and the answer was a general denial, and that the notes

had been theretofore transferred to one Cerini, who brought an action to recover thereon, which was dismissed; and the judgment in that action is pleaded in bar of this. The court made general findings that all the allegations of the complaint were true, and all the allegations of the answer untrue, and rendered judgment against defendant, from which, and an order denying him a new trial, he appeals.

There is no substantial merit in the appeal. The objection that the findings are insufficient to cover the issues is untenable (*Pralus v. Mining Co.*, 35 Cal. 34; *Carey v. Brown*, 58 Cal. 184; *Moore v. Waterworks Co.*, 68 Cal. 146, 8 Pac. 816); and the further objection that the findings are unsupported by the evidence equally so. The only particular suggested under the latter point is as to the sufficiency of the demand and notice, and of that there is no question. Judgment and order affirmed.

BUHMAN v. BECKER.

No. 18,814; October 12, 1895.

42 Pac. 28.

Assumpsit for Services Rendered—Sufficiency of Evidence.—In assumpsit for the value of services in permanent improvements of a vineyard, defendant admitted the improvements, but claimed that they were made by plaintiff as lessee. There was evidence that defendant persuaded plaintiff, his son in law, to take the vineyard instead of leasing other land, saying that he did not know whether any profit could be made out of it or not, but that plaintiff would lose nothing by it; that he told plaintiff and others that he intended to give the vineyard to his daughter, and advised plaintiff to make improvements; that, until the death of his wife, plaintiff worked part of the time for defendant, but most of the time in improving the vineyard, paying out above receipts \$2,900; that, after the death of the wife, defendant demanded \$1,000 for rent, and that plaintiff leave the premises with all the improvements. Held, that plaintiff should recover for his services and the improvements.

APPEAL from Superior Court, Solano County; A. J. Buckles, Judge.

Action by William Buhman against Charles Becker for reasonable value of services in working and permanent im-

provements to a vineyard. From a judgment for plaintiff, defendant appeals. Affirmed.

Driver & Sims for appellant; J. M. Gregory for respondent.

VANCLIEF, C.—Action to recover from defendant the reasonable value of work and labor alleged to have been performed by plaintiff for and at the request of defendant in cultivating a tract of defendant's land, on which was a vineyard, during the years A. D. 1891 and 1892, and in constructing upon said land a dwelling-house and a barn, and in manufacturing boxes and trays in which to cure and store raisins produced from said vineyard; and also to recover the value of the lumber and other materials furnished and used by plaintiff in the construction of said house and barn, and in manufacturing said boxes and trays. The amount for which plaintiff prays judgment is an alleged unpaid balance of \$4,345.27. The defendant denied that the alleged labor was performed or the materials furnished at his request, and denied that he promised to pay for either. He also filed a cross-complaint, alleging that he leased said tract of land and said vineyard to plaintiff at a rental of \$500 per annum, and that plaintiff occupied and cultivated the land and vineyard during said term as a tenant under said lease; that there was due from plaintiff to defendant \$1,000 for rent, and also \$2,104.73 for money which, at the special instance and request of the plaintiff, the defendant had expended and paid out in erecting improvements on said leased premises, and for conducting the business of raising grapes thereon, which the plaintiff promised to pay out of the proceeds of the first grape crop, but which he has wholly failed to pay; and for these sums, amounting to \$3,104.73, the defendant prays judgment against the plaintiff. The court found that plaintiff had performed the labor and furnished the materials at the instance of defendant, as alleged in the complaint, and that the answer and cross-complaint of defendant were wholly untrue, except that defendant had paid to plaintiff during said term sums of money amounting to \$1,722.73, but further found a balance due plaintiff from defendant of \$2,104.65, for which judgment was rendered against defendant. Defendant appeals from the judgment on a bill of exceptions as to matters of law and fact.

I think the evidence justifies the findings of fact. Without conflict it shows that plaintiff performed the labor and furnished the materials, as alleged in the complaint, at the instance of the defendant, and that such labor and materials were reasonably worth as much as they were estimated to be worth by the court. Nor was there any dispute that defendant had advanced to plaintiff \$1,722.73, for which the court gave defendant credit. As to the additional credit of \$382 claimed by defendant, the preponderance of evidence was clearly against him. On the issue as to a lease of the land to plaintiff, the direct express testimony was conflicting, and about evenly balanced; but the circumstantial evidence was altogether in favor of the plaintiff.

Counsel for appellant seem not to appreciate the force of the circumstantial evidence, the salient features of which are as follows: The defendant is a farmer, estimated to be worth sixty to seventy thousand dollars. In November, 1890, defendant's daughter Emma and plaintiff became engaged to be married, and plaintiff was then negotiating for a lease of land from a Mr. Curtis, on which he intended to live after marriage. About a week after the engagement, and only two weeks before the marriage of plaintiff to defendant's daughter, defendant dissuaded plaintiff from taking the lease from Curtis, and persuaded him to take and cultivate defendant's vineyard tract. As to the terms of the agreement then made, the evidence is conflicting, but sufficient to justify the finding of the court. On the part of the plaintiff it tends to prove that defendant told plaintiff that he had never been able to determine whether any profit could be made from the vineyard or not, but that, if plaintiff would take and run it carefully long enough to determine whether it could be made profitable (no definite time mentioned), defendant would guarantee that plaintiff should lose nothing by the experiment; that, before and frequently after the marriage, defendant told plaintiff and others that he intended to give the quarter section, including the vineyard, to plaintiff's wife for her home, and advised plaintiff to erect thereon all the improvements above mentioned. From the date of their marriage, in November, 1890, until the summer of 1891, plaintiff and his wife lived with defendant's family, working a part of the time for defendant, but most of the time on the improvements of the vineyard tract; that, besides his own personal labor,

plaintiff expended during the years 1891 and 1892 about \$2,900 of his own money on the improvements, and in carrying on the grape and raisin business, over and above all receipts from the produce of the vineyard; that on May 29, 1892, plaintiff's wife died; that, immediately after the harvest and marketing of the grape crop of 1892, plaintiff and defendant first attempted to settle the affairs of their business, when defendant demanded \$1,000 for rent, and that plaintiff should lease the premises with all the improvements thereon constructed by him. With the aid of these circumstances, the evidence, though conflicting, is quite sufficient to justify the finding that there was no lease, and that it was not intended nor understood by either party that the plaintiff was to pay rent; but, on the contrary, that defendant expressly informed plaintiff that he intended to give the land to plaintiff's wife for her home, and intentionally induced plaintiff to make the permanent improvements thereon with the understanding that they should be occupied and used as his future home. In accordance with defendant's direction, plaintiff kept accurate accounts of the expenses and receipts of the vineyard during the two years, showing a loss of \$62.60. The judgment for \$2,104.65 is composed of three items, as follows: Labor and material in making the trays and boxes, \$1,112.50; labor and materials in constructing buildings and fences, \$2,302.28, less \$1,372.73 paid by defendant—\$929.55; and loss in cultivating vineyard, \$62.60. It does not appear that plaintiff was allowed any compensation for his labor in managing or cultivating the vineyard. The trays and boxes, as well as the fixtures, remain in possession of defendant, who forbade the removal thereof by plaintiff. I think the judgment should be affirmed.

We concur: Britt, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

AUSTIN v. PULSCHEN et al.*

No. 15,835; October 12, 1895.

42 Pac. 306.

Vendor's Lien—Waiver.—A Finding That, After Plaintiff sold her land she signed and delivered to a certain person "two unacknowledged deeds to said premises," should not be held to constitute an abandonment of a lien for the purchase price, where it was also found that plaintiff did not waive her lien, and that said person, "being a mortgagee, must account to plaintiff for the profits."

Vendor's Lien.—Where Plaintiff, in Possession of Land, which she held under a recorded contract of sale, and upon which there was a lien for the purchase price, agreed to sell the same in consideration that the vendee discharge said lien, and give his notes to her for the payment of a further sum, and that she retain possession until they were paid, and the vendee borrowed money from another, giving him a mortgage on the land therefor, and the sum borrowed was paid to the holder of the first lien, who conveyed directly to the vendee, the mortgage must be postponed to plaintiff's lien, the mortgagee not being entitled to be subrogated to the original lien.¹

APPEAL from Superior Court, Santa Clara County; John Reynolds, Judge.

Action by Mary A. Austin against Gustav Pulschen, R. H. McDonald and others, to enforce a vendor's lien. A judgment refusing her a preference of lien was reversed in department (4 Cal. Unrep. 988, 39 Pac. 799), and R. H. McDonald appeals to the court in bank. Commissioners' decision affirmed.

J. R. Welch for appellant; Sawyer & Burnett, Dorn & Dorn and Morehouse & Tuttle for respondent.

McFARLAND, J.—After full consideration of this cause in bank we are satisfied with the opinion delivered and the conclusion reached in department: 4 Cal. Unrep. 988, 39 Pac. 799. The petition for a rehearing in bank is mainly concerned with the proposition that Mrs. Austin, after her sale to Pulschen, conveyed the land to Rosencrantz, and thereby destroyed

*For subsequent opinion in bank, see 112 Cal. 528, 44 Pac. 788.

¹ Cited in the note in 37 L. R. A., N. S., 1207, on right of one advancing money for purchase price of property to be subrogated to vendor's lien.

her vendor's lien. But there is no finding that she conveyed to Rosencrantz. The court finds that at a certain time Pulschen made a deed of the premises to Rosencrantz, which was intended and understood to be a mortgage to secure \$600. It is also found that shortly afterward plaintiff sold some personal property to Rosencrantz, and also "signed and delivered to said Rosencrantz two unacknowledged deeds to said premises"; but it is also found that she did not by said deeds "waive any lien which she had or claimed to have upon said premises." What kind of "deeds" those were does not appear. A deed is simply a sealed instrument, and may be a grant, a mortgage, a bond, or any kind of contract. In some connections a "deed to said premises" might, no doubt, be construed to mean an absolute conveyance of the fee; but here the court evidently did not use the phrase in that sense. It is immediately added that by said deeds plaintiff did not waive her lien; and, moreover, it is found that Rosencrantz, by said deeds or otherwise, became the owner of the premises; but it is adjudged "that said Rosencrantz, being a mortgagee only of said premises, must account to said plaintiff for all the profits," etc. Whatever those deeds were—whether mortgages or otherwise—they disappear from the case; and there is no appeal by plaintiff from the judgment in favor of Rosencrantz as a mortgagee.

There is nothing in the point that the money borrowed by Pulschen from McDonald—\$2,500—was paid to the original owners, Bruce and Kent. That payment was in accordance with the contract between plaintiff and Pulschen. When that payment had been made to avoid a circuitry of conveyance, Bruce and Kent, at plaintiff's request, conveyed directly to Pulschen, and plaintiff and others, supposed to have some shadow of title, joined in the conveyance. But her vendor's lien for the balance of the purchase money coming to her was as perfect as if Bruce and Kent had conveyed to her before she made her contract with Pulschen. That part of the judgment appealed from is reversed, and the lower court is instructed to modify the judgment in accordance with the opinion of Mr. Commissioner Vancielief delivered in department.

We concur: Garoutte, J.; Van Fleet, J.; Harrison, J.

TEMPLE, J., Dissenting.—I cannot concur in the judgment in this case. The finding that for a valuable consideration plaintiff signed and delivered to Rosencrantz two deeds to said premises is not ambiguous. It can only mean that she conveyed the premises to Rosencrantz. It is idle to claim that the meaning is rendered uncertain because at common law a deed was simply a sealed instrument. The word is never so used here. On the contrary, it always means a conveyance of land. But this is not important. McDonald was certainly entitled to be subrogated to the position of Bruce and Kent, as security for the \$2,700 paid to them. It is said in the opinion that he cannot be subrogated, because he paid the money under contract with Pulschen. That is why he is entitled to be subrogated. Had he paid it as a mere volunteer, he would not have been so entitled. Had plaintiff foreclosed her lien against Pulschen, she would have taken the land subject to the charge. As McDonald paid it for her, why should he not retain a lien for it? It was a claim against her estate. How has she become discharged from it? The debt was a charge against the land, which plaintiff was bound to pay. When one—not as a volunteer, but to protect his own interests—pays such a debt, he is entitled to be subrogated to the rights of the creditors whose debt he has paid, so far as necessary to secure repayment from the estate which was subject to the charge: *Carpentier v. Brenham*, 40 Cal. 221; *Randall v. Duff*, 107 Cal. 33, 40 Pac. 20.

We concur: Beatty, C. J.; Henshaw, J.

PEOPLE v. VAN SCIEVER.

Crim. No. 61; October 12, 1895.

42 Pac. 451.

Embezzlement—Sufficiency of Evidence.—In a Prosecution for Embezzlement of a check, the evidence showed that one T. employed defendant as a broker to obtain a loan for him; that defendant went to complainant, who agreed to make the loan, and defendant was directed by her to attend to the matter of looking after the title to the land, and taking of a mortgage thereon; that defendant found the title satisfactory; that T. made the mortgage, and gave it to defend-

ant, to be delivered to complainant on receipt of the money; that afterward she drew the check in question for the balance in favor of defendant, who cashed it, and with the proceeds paid certain of T.'s obligations; and that defendant refused to deliver to complainant the mortgage until she settled with him for his services in the matter, and for certain other services which he claimed to have rendered her. Held, that the evidence was insufficient to sustain a conviction.

APPEAL from Superior Court, Los Angeles County; B. N. Smith, Judge.

T. W. Van Sciever was convicted of embezzlement, and appeals. Reversed.

D. K. Trask, W. R. Bacon and Carter & Pierce for appellant; Attorney General Fitzgerald for the people.

VAN FLEET, J.—The defendant was charged with embezzlement in converting to his own use a bank check for \$1,075, the property of one Mrs. Anderson. He appeals from the judgment and an order denying him a new trial.

But one point need be noticed. It is contended that the evidence does not support the verdict, and it is clear that it does not. One Taylor desired to procure a loan of \$2,200, to be secured by a mortgage upon land owned by him in San Bernardino county, and employed defendant, as broker, to negotiate the loan, and get the money for him. Defendant went to Mrs. Anderson, for whom he had previously loaned money, and with whom he had had considerable other business, who agreed to make the loan to Taylor, and defendant was directed by her to attend to the matter of looking after the title to the land in her behalf, and the taking of the mortgage. Defendant accordingly examined the land and the title, and, finding them satisfactory, procured the due execution of the mortgage by Taylor, and the same was given by Taylor to defendant, to be delivered to Mrs. Anderson upon receipt of the money. Mrs. Anderson did not have the entire amount required on hand at the time of the execution of the mortgage, but certain sums were paid over to Taylor, through defendant, from time to time, until a balance of \$1,075 remained. Subsequently Mrs. Anderson drew her check in favor of defendant for this balance, to enable him to pay the money over to Taylor. Defendant cashed the check, and with the proceeds paid certain

of Taylor's obligations. When Mrs. Anderson asked defendant for the mortgage, the possession of which he still retained, he refused to deliver it to her, until she should settle with and pay him for his services in the matter in hand, and certain other services which he claimed to have rendered her. She denied owing him anything, and, upon his further refusal to deliver the mortgage, procured him to be arrested, upon the charge of embezzling the check in question. This is the substance of the material evidence in the case, and, in our judgment, it wholly fails to establish embezzlement of the check. Defendant was the agent of both parties to the transaction. He was Taylor's agent for the procuring of the loan and the receipt of the money, and he was the agent of Mrs. Anderson in taking the mortgage. When the mortgage was executed and delivered to defendant, it was constructively delivered to Mrs. Anderson, and when the latter paid the money over to defendant it was a payment to Taylor, and the title to the check and its proceeds immediately passed from Mrs. Anderson to Taylor, and the former ceased to have any further property therein. It was, therefore, not the subject of embezzlement as her property, and the whole question as to the disposition made by defendant of the proceeds of the check, and as to his authority to make such disposition, about which a great deal of evidence was introduced into the case, was wholly immaterial. So far as Mrs. Anderson was concerned, if defendant was guilty of appropriating any property belonging to her, it was the mortgage, and not the check; but with that defendant was not charged. The judgment and order are reversed.

We concur: Harrison, J.; Garoutte, J.

HAAS et al. v. MUTUAL RELIEF ASSN. OF PETALUMA.*

L. A. No. 27; October 24, 1895.

42 Pac. 237.

Change of Venue—Sufficiency of Application.—A recital, in an affidavit by a mutual benefit association to change the place of trial of an action against it from L. to S. county, "that all payments of benefits that have become due and payable to the nominees of any

*Rehearing denied.

deceased member are made and always have been made by a warrant payable in the city of P.," in S. county, does not controvert an allegation in the complaint that defendant promised to pay at A. in L. county, and justifies the refusal of the motion.

APPEAL from Superior Court, Los Angeles County; Walter Van Dyke, Judge.

Action by Haas and another against the Mutual Relief Association of Petaluma on a benefit certificate. From an order denying its motion to change the place of trial, defendant appeals. Affirmed.

Lippitt & Lippitt for appellant; J. F. Conroy for respondents.

PER CURIAM.—Appeal from an order denying a motion to change the place of trial. The action was commenced in the county of Los Angeles, and a motion was made by the defendant to transfer the cause for trial to the county of Sonoma. Upon the hearing of the motion there was read to the court an affidavit in behalf of the defendant showing that by its articles of incorporation the county of Sonoma is its principal place of business, and also the complaint in the action, which contains the allegation that the defendant promised to pay the money sued for herein at Los Angeles. The defendant did not controvert the truth of this allegation, but in the affidavit filed on its behalf merely stated "that all payments of benefits that have become due and payable to the nominees of any deceased member of said corporation are made, and always have been made, by a warrant drawn in favor of the nominees upon the treasurer, and payable in the city of Petaluma." This statement, however, instead of traversing the averment in the complaint, is entirely consistent with the fact that the defendant promised to pay the sum sued for herein at Los Angeles, and justified the court in denying the motion upon the ground that the contract was to be performed in that county: *Trezevant v. W. R. Strong Co.*, 102 Cal. 47, 36 Pac. 395; *Lake Shore Cattle Co. v. Modoc Land & Livestock Co.*, 108 Cal. 261, 41 Pac. 472. The order is affirmed.

REMY v. OLDS et al.

No. 18,316; November 4, 1895. ✓

42 Pac. 239.

Disqualification of Judge—Calling Another Judge.—Code of Civil Procedure, section 398, requiring a judge who is disqualified from acting in a cause to transfer it, if pending before him, to some other court, is not satisfied by calling to the court of the disqualified judge a judge who is not disqualified.¹

APPEAL from Superior Court, Merced County; Joseph H. Budd, Judge.

Action by Theophile Remy against E. J. Olds and others. From an order denying change of venue, defendants appeal. Reversed.

J. W. Knox for appellants; James F. Peck and T. C. Law for respondent.

BRITT, C.—Messrs. J. K. and T. C. Law, brothers, were attorneys for plaintiff in this action. The former was elected judge of the superior court of Merced county, where the action was and is yet pending, and entered upon the discharge of the duties of that office; his brother remained an attorney of record for the plaintiff. This being the situation of the case, defendants notified plaintiff that they would on December 7, 1893, move said court to change the place of trial of said action to another superior court on the double ground of the relationship of Hon. J. K. Law, judge of the Merced court, to one of the plaintiff's attorneys, and that he had himself been an attorney for the plaintiff in the action. The fact of such notice being brought to the attention of Judge Law on December 4th, he announced to the parties in open court that

¹ Cited and approved in *City of Oakland v. Hart*, 129 Cal. 105, 61 Pac. 782, a case in which the disqualified judge had so called in another superior court judge, but with the concurrence of counsel. It was held there that, after important matters had been disposed of before the judge called in, the parties could not raise a question as to the regularity of his appointment.

Cited in *People v. Ebey*, 6 Cal. App. 772, 93 Pac. 381, where the rule of disqualification is discussed and applied in a criminal case.

he would not hear the motion, but would have another judge to hear it. Defendants objecting to such course, he stated that the objection should be presented to such other judge. On said December 7th, Hon. Joseph H. Budd, judge of the superior court of San Joaquin county, at the request of Judge Law, held a session of the said Merced superior court for the dispatch of various matters, and called for hearing the said motion for change of venue. Defendants objected, for the reasons, among others, that it was the duty of said judge of the Merced court to hear the motion; that he was then present in the courthouse; and that Judge Budd had been selected and requested by him to be present for the purpose of hearing such motion. The matters of fact stated in the objections made were shown by evidence admitted in support thereof. The objections were overruled, Judge Budd stating that he would then, or as soon as counsel were ready, preside as judge on the trial of the case. An order was then entered reciting that the motion was heard at a session of the court held by Judge Budd, at the request of Judge Law; that the former was not disqualified to act as judge at the trial of the action—and denying the motion.

The statutes pertaining to the matter may be thus abstracted: No judge shall act as such in any action when he is related to an attorney or counsel of either party by consanguinity or affinity within the third degree, or when he has been attorney or counsel for either party in the action; but his disqualification does not extend to the power of transferring the action to another court: Code Civ. Proc., sec. 170, as amended in 1893. The court may, on motion, change the place of trial when from any cause the judge is disqualified from acting: Id., sec. 397. If an action is pending in a court, and the judge is disqualified from acting as such, it must be transferred for trial to a court the parties may agree upon; or, if they do not agree, then to the nearest court where the like objection does not exist: Id., sec. 398.

The case differs in no material particular from *Upton v. Upton*, 94 Cal. 26, 29 Pac. 411, where similar proceedings by the same judges, resulting in a denial of an application for change of venue, were sustained by this court; and the order appealed from here should be affirmed if that case is to be followed. But the court subsequently said of *Upton v. Upton*: "We felt constrained to follow the decision in *Paige v. Car-*

roll, 61 Cal. 216. We did so, however, because the point of practice had been so settled, and not without serious doubts as to the correctness of the decision, which ignores what seems to be a substantial provision of the statute, designed to prevent the selection by either party to the controversy by the court and judge before whom the trial is to be had. It is not necessary here to determine whether the practice tolerated in *Upton v. Upton* and *Paige v. Carroll* can be longer recognized": *Krumdick v. Crump*, 98 Cal. 119, 32 Pac. 800. In the present instance that necessity arises; and it seems to us that the sooner cases which ignore such a provision of the statute are overruled, the better for the courts, at least, in which any ground for suspicion even of indelicacy in matters of this sort would be lamentable. For the purposes under view, the law treats counsel as identified with his client. It has made axiomatic the principle that no man ought to be a judge in his own cause: *North Bloomfield Gravel Min. Co. v. Keyser*, 58 Cal. 322. High authorities seem to consider such a power not conferrable by act of parliament or the constitutions of our states: *Co. Litt.*, sec. 212; *Cooley Const. Lim.*, pp. 207, 506-509. But the difference between judging one's own cause and the right to select another to judge therein is more of shadow than substance. To men of turn for intrigue probably the latter privilege would appear more valuable than the former. We consider that the statute which requires a judge who is disqualified from acting in a cause by reason of interest, or by having been of counsel, or otherwise, to transfer the same if pending before him to some other court (*Code Civ. Proc.*, sec. 398), is not satisfied by his calling a judge who is not disqualified, and who must perforce deny the transfer, and so become the appointee of the first for the trial of the cause; and, without meaning to intimate by anything here said—as we do not at all suspect—that either of the learned judges named was actuated by other than the sincerest desire to keep within the law and serve the substantial convenience of the litigants, we are of the opinion that the order appealed from should be reversed. It will, of course, be understood that the ruling here does not forbid the parties to agree upon another judge, who, pursuant to such agreement, might be requested to try the action in the court where the same is pending, as provided by the constitution (article 6, section 8); and, in those courts having several judges, the necessity for transfer

of a cause on this ground cannot exist, unless all the judges are disqualified.

We concur: Searls, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order appealed from is reversed.

THRESHER v. GREGORY et al.

No. 18,421; November 5, 1895.

42 Pac. 421.

Sale—Measurement of Fruit—Evidence.—In an action for the price of peaches sold on a contract fixing the price per pound for each of several sizes of fruit "per box packed," where no method of measurement is provided, evidence of prior negotiations between the parties, out of which the contract grew, is admissible. In such action, where defendant contended that the size and weight of the boxes determined the size and weight of the fruit, an experienced fruit raiser and packer, who saw plaintiff's fruit packed, could testify that peaches could not be graded in that way, as they were packed in "break joints," by placing the upper layer in the space between the fruit in the lower layer; and he could also testify as to the average size of plaintiff's fruit, and the average weight of the several sizes as packed.

Sale—Measurement of Fruit.—In an Action for the Price of fruit sold on a contract which merely fixed the price per pound for each of several sizes of fruit packed, correspondence subsequent to the contract, showing that the method of measuring the fruit had not been agreed on, is admissible on the issue as to measurement. Where, in such a case, defendant testifies that the contract with plaintiff is his usual form of contract, he may be asked on cross-examination to write out a contract in his usual form, and such contract may be put in evidence.

Sale—Measurement of Fruit.—Where, in an Action for the Price of peaches under a contract fixing the price according to the size and weight of the fruit, there is a disagreement as to the method of measurement, and defendant testifies that measuring-boards like those used by plaintiff injured the fruit, and rendered it unfit for shipping, plaintiff may, in rebuttal, testify that he had seen defendant and others use such boards, and then use the fruit.

APPEAL from Superior Court, Sacramento County; Matt F. Johnson, Judge.

Action by C. W. Thresher against Gregory Bros. & Co. for the purchase price of peaches. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

Johnson & Johnson for appellants; Holl & Dunn for respondent.

BELCHER, C.—The plaintiff brought this action to recover the sum of \$376.65, balance alleged to be due for peaches sold and delivered by him to defendants in 1892, and also to recover the further sum of \$332.95, balance alleged to be due for peaches sold and delivered by George and P. B. Thresher to defendants in 1892, and by the sellers assigned to plaintiff. The defendants, by their answer, admit the purchase of the peaches, but aver that the balance remaining due and unpaid to plaintiff for his peaches is only \$22.40, and that the balance remaining due and unpaid to plaintiff's assignors for their peaches is only \$77.90, and they offer to allow judgment to be taken against them for the aggregate of these amounts. The case was tried by the court without a jury, and the findings were that for the peaches purchased of plaintiff there was still due and unpaid the sum of \$174.86, and for the peaches purchased of plaintiff's assignors there was still due and unpaid the sum of \$172.20, and that plaintiff was entitled to judgment for the aggregate of these sums, \$347.06, with legal interest thereon from September 30, 1892, until the rendition of the judgment. Judgment was accordingly so entered, from which, and from an order denying a new trial, defendants appeal.

The contracts between the parties were in writing. Defendants agreed with plaintiff to pay him for his fruit the following prices: "One and one-half cents per pound for two and one-quarter to two and one-half inch fruit, and one and three-quarters cents per pound for two and one-half to three inch fruit, and two cents per pound for all above three inches, per box, packed." A similar contract was made with plaintiff's assignors. The fruit was packed by experienced packers, and in boxes furnished by defendants. There was no dispute as to the number of boxes delivered, but the controversy between the parties was as to the method of determining the sizes of the fruit. The defendants claimed that a four-inch

box should be deemed to contain two-inch peaches, and a five-inch box two and one-half inch peaches, and so on; and the plaintiff claimed that such boxes would contain peaches of larger sizes than those named. The court found: "That the contracts do not provide by what method the size of the fruit shall be determined, or how the fruit shall be measured to ascertain the quantity of each size specified in the contract. That there was no agreement at any time between the parties as to how the fruit should be measured, or as to how the size of fruit should be determined, or as to how the fruit should be graded, so as to ascertain the quantity of fruit of each size stated in the contract delivered to the defendants. That the size of the boxes used in packing the fruit will not determine and fix the size of the fruit packed in the boxes as fruit of the size of one-half the depth of the boxes in which it is packed. That all of this fruit was packed by what is known as 'broken joints'; that is, so that each peach in the upper layer would rest between peaches in the lower layer, and so as to touch on two or three, and sometimes four, peaches in the lower layer. That all the fruit was packed with two layers to the box, and that two layers of peaches two and one-half inches in size could be, and often were, packed in the four and one-half inch boxes. That all the fruit in the four and one-half inch boxes was fruit from two and one-quarter to two and one-half, and including fruit two and one-half, inches in size. That all of this fruit was packed by experienced packers in the employ of the defendants. That a large number of the five-inch boxes, by reason of the size of the fruit packed in them, were what is known as 'cleated'—that is, a strip of wood varying from three-eighths to one-fourth inches in thickness was placed under the ends of the covers to the boxes so as to raise the covers the thickness of such cleats, and thereby increase the space inside the boxes, from the bottom to the cover, from five inches to five and three-eighths or five and one-quarter inches—and that in such boxes two layers of peaches over three inches in size could be and were packed, and that a number of five-inch boxes, after being packed, were double cleated—that is, two cleats were placed under each end of the cover so as to increase the depth of the boxes between the cover and the bottom; but I cannot tell from the evidence how many of the five-inch boxes were single cleated and how many were double cleated, and I cannot, therefore, fix the amount of fruit

delivered to and received by the defendants that was over three inches in size. But I find that all the fruit in the five-inch boxes, whether cleated or not, was over two and one-half inches in size." Counsel for appellants make no point as to the insufficiency of the evidence to justify the findings, but insist that numerous errors in law were committed by the court during the trial which call for a reversal.

The first point made is that the court erred in overruling objections to questions propounded to the witness E. J. Gregory on cross-examination. The witness, on his direct examination, had testified very fully as to the negotiations between the parties prior to the making of the written contracts, and had said: "In these contracts the size of the boxes was to determine the size of the fruit"; that "it was then determined between us that a four and one-half inch box would represent two and one-fourth inch fruit; a five-inch box would determine the size of the peaches to be two and one-half inches, and a six-inch box would determine the size to be three inches"; and that was what "per box packed" meant in the contract. And again: "We agreed with the Threshers that the size of the boxes would grade the fruit, because it is the custom and the experience, and because we have never done anything different before." The questions objected to were as to the prior negotiations, and the objections were that they were irrelevant, immaterial, incompetent and not cross-examination, and that the matters sought to be elicited were merged in the written contract. There was no controversy as to the prices to be paid for the fruit when its sizes were ascertained, but the question was as to how its sizes were to be determined. Upon this question the written contract was silent, and evidence to overcome the theory of appellants that the size of the boxes would determine the size of the fruit was admissible. The rule invoked by appellants that, when the terms of an agreement have been reduced to writing, "no evidence of the terms of the agreement other than the contents of the writing" can be given (section 1856, Code of Civil Procedure), is not in point. We conclude, therefore, that the court did not commit any prejudicial error in allowing the cross-examination complained of.

The next point made is that the court erred in overruling objections to certain questions put to T. B. Hutchinson, a witness called for plaintiff. The witness had a fruit ranch which

was separated from the plaintiff's ranch only by the Feather river, and had a similar contract with defendants for the sale of his fruit. He testified that he had been in the business twelve years, and had had experience in packing fruit for shipping and other purposes, and that he did not think one could grade fruit by the size of the box, and be able to tell the size of the fruit in the box. He was asked to explain why, and said: "Well, in packing peaches they pack what we call 'break joints'; that is, they put peaches of the upper layer in the spaces between peaches in the lower layer. So you can put larger than two layers of two-inch peaches in a four-inch box, and you can put larger than two layers of two and one-half inch peaches in a five-inch box. That is the usual way of packing peaches." He also said that he was present at plaintiff's place, and saw the packing, and that it was done that way right along. He further said that he was at plaintiff's orchard during the packing season, and saw his peaches, and that he measured his own peaches frequently during the season, for the purpose of ascertaining what size they were running, and what he should receive for them. He was then asked if, from the grading of his own orchard, he could tell in reference to the size of plaintiff's peaches, and again, as to what would be the average weight of four and one-half inch boxes of freestones, and if he knew the average weight in that neighborhood of clingstones that season. These questions were objected to as irrelevant, immaterial, and incompetent, and the objections were overruled. It is admitted that his was expert testimony, but it is claimed that it was incompetent, because the weight of the peaches in controversy was capable of actual demonstration. It was evidently offered to overcome the defendants' theory that the size and weight of the boxes conclusively determined the size and weight of the fruit, and for this purpose we think it admissible. The witness also, in answer to a question put to him, said: "E. J. Gregory said to me he made the contract, and said he never saw such a fool contract." Counsel for defendants moved to strike out the answer, and the motion was denied. When E. J. Gregory was on the stand as a witness for defendants he admitted that he "said something about the contract being a 'fool' contract." Conceding, then, that the objections to the answer were well taken, still we fail to see that defendants could have been prejudiced in any way by the ruling.

The plaintiff offered in evidence two letters, and they were admitted over the objections of defendants. The first was from defendants to plaintiff, dated August 10th, and stating that they were paying others in his section thirty-five cents per box for peaches, and asking if that price would be satisfactory to him. The second was a reply by plaintiff, stating that the price named was not satisfactory, and that nothing less than thirty cents for a four-inch box, thirty-five cents for a four and one-half inch box and forty cents for a five-inch box would satisfy him. It is evident from these letters that the written contract was not regarded by the parties as fixing the method by which the grade and weight of the fruit were to be determined, and that that was left an open question for subsequent settlement. It was proper, therefore, to admit the letters in evidence to show the understanding of the parties, and the necessity for some agreement upon the question in controversy.

Complaint is made that the court refused to permit the defendants to show the size of the fruit in neighboring orchards, as plaintiff had been permitted to do. But the question objected to was not as to the size of the fruit in neighboring orchards, but "What was the average size of boxes used at all these points?" The points referred to were Chico and other places many miles away. Obviously, the answer to the question would in no way have helped to solve the question in hand, and it was therefore properly excluded.

On his direct examination the witness E. J. Gregory testified that the contract with plaintiff was exactly the same form of contract that had been used by defendants for twenty years; that there was no other method of grading the fruit agreed upon; and that the method claimed by him was what the words "per box packed" in the contract meant. On his cross-examination the witness was asked about the usual contracts made by defendants, and to then and there write out a specimen of them. He then wrote out a contract and the plaintiff offered it in evidence. It stated that the seller sold to Gregory Bros. Co., and that Gregory Bros. Co. bought of the seller, "all his present crop of sound, merchantable, shipping peaches now in bearing in his orchard, at the agreed price of thirty cents per box packed." All this evidence was

admitted over the objections of defendants that it was irrelevant, and not proper cross-examination; but, in our opinion, the rulings were obviously correct. Several other questions put to the witness Gregory on cross-examination were objected to, and the objections overruled. These rulings are assigned as errors, but they, too, were, in our opinion, so clearly correct that no special notice of them is required.

E. A. Light was called as a witness for plaintiff in rebuttal, and testified that he worked for Hutchinson between July and October, 1892, and was his foreman; that he knew about the packing on Hutchinson's place, and that two and three-quarters inch fruit was put in four and one-half inch boxes, but that he did not know how they packed at Thresher's. He was asked if he weighed any fruit from Hutchinson's place, and, over the objection of defendants, was permitted to answer that he weighed most of it, and then to state what the average weight was. It is claimed that this testimony was incompetent, and was prejudicial to defendants. But it had already been proved that the ranches were separated only by a river; that the fruit on the Hutchinson ranch was sold to defendants under a similar contract, was packed by the same packers, in the same sized boxes, and was the same variety of fruit. Under these circumstances the testimony objected to would seem to have been clearly admissible to show what was the probable weight of the boxes packed on plaintiff's ranch. The defendant E. J. Gregory and other witnesses for defendants had given evidence tending to show that measuring-boards, like those used by the Threshers, were never used to measure fruit to ascertain its size, and that to use such boards would bruise and injure the fruit, and make it unfit for shipping purposes. In rebuttal George Thresher was allowed, over the objection of defendants, to testify that he had seen defendants' own packers use such boards to measure some of the fruit, and then use the fruit; and also had seen such boards used in other orchards and in canneries. The testimony was competent and admissible for the purposes for which it was offered, and we see no error in the action of the court admitting it.

The above are all the points which require special notice. We conclude that the evidence was sufficient to justify the

findings of the court, and that no prejudicial error was committed in any of its rulings. The judgment and order appealed from should be affirmed.

We concur: Britt, C.; Vanciel, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

LEVERONE v. HILDRETH.

No. 18,382; November 13, 1895.

42 Pac. 317.

Appeal.—Where There is a Substantial Conflict in the evidence, the findings of the trial court will not be disturbed.

APPEAL from Superior Court, Fresno County; M. K. Harris, Judge.

Action by William M. Leverone against George W. Hildreth. There was a judgment for defendant and plaintiff appeals. Affirmed.

Tupper & Tupper for appellant; Craig & Meredith for respondent.

PER CURIAM.—The plaintiff brought this action on a promissory note, dated August 1, 1885, and payable one day after date, and the defendant pleaded as a defense thereto that there was no consideration for the execution of the note by him. The note was originally made by Thomas Hildreth, the father of defendant, and some months later was signed by defendant. The case was tried and the findings and judgment were in favor of the plaintiff. From that judgment and an order denying a new trial the defendant appealed. After a hearing by this court in bank, the judgment and order were reversed and the cause remanded, upon the ground that the findings as to the consideration for the execution of the note by defendant were against all the evidence. The court said: "There is no material conflict of testimony as to the circum-

stances under which he added his signature to the note. Respondent was pressing his father for payment, and, at the father's request, the son signed. There was no extension of credit, no promise of forbearance, written or oral": 80 Cal. 139, 22 Pac. 72. The case was again tried, and the court found that "there was no consideration for the execution by the defendant of the promissory note set forth in the complaint of the plaintiff," and gave judgment accordingly for defendant. From that judgment and an order denying his motion for a new trial the plaintiff prosecutes this appeal.

In support of the appeal it is earnestly contended that the finding that there was no consideration for the execution of the note by defendant was not justified by the evidence, because "it appears from the evidence, without any conflict, that defendant, George W. Hildreth, at the request of plaintiff, signed the note upon plaintiff's agreeing not to sue or attach defendant's father, Thomas Hildreth, at once, but to wait, and to give him a few months within which to pay the note," and that "plaintiff waited from November, 1885, the time of the agreement, until February 9, 1887, before bringing suit." It is true that the evidence introduced by the plaintiff tended strongly to support his theory, but it was not without conflict. On the contrary, the evidence introduced by defendant was, in our opinion, quite sufficient to raise a substantial conflict upon the question in controversy. It would subserve no useful purpose to state the evidence in detail. The case falls within the well-settled rule that, when there is a substantial conflict of evidence, the findings of the trial court will not be disturbed on appeal.

The judgment and order must be affirmed, and it is so ordered.

FOGEL v. SAN FRANCISCO AND SAN MATEO RAILWAY COMPANY.

No. 16,011; November 25, 1895.

42 Pac. 565.

Carrier—Injury to Passenger—Evidence as to Switch.—In an action for injury from being thrown from a car by its coming to a sudden stop, by reason of a defective switch, while being run at a high rate of speed, evidence that other persons than plaintiff were thrown from the car and injured is admissible to overcome the claim of defendant that plaintiff's injuries were caused by his negligence in jumping from the car when in motion.

Carrier—Injury to Passenger—Evidence as to Switch.—In an action for injuries received in an accident due to a defective switch, evidence by a skilled switch-tender as to whether anything was not done that could have been done to have avoided the accident is inadmissible, as invading the province of the jury.¹

Witness—Physician as Expert.—Where a Witness Shown to be a physician has been "examined at length" as to plaintiff's injuries, it will be assumed that a proper foundation has been laid to enable him to testify as a medical expert.

Trial—Remarks of Attorney.—The Fact That Plaintiff's Counsel, in an action against a railroad company passing through a city, for personal injuries, said that "there is no road in the city . . . that has caused so many accidents as this road, as is well known," is not ground for reversal where it was casual, and did not evidently influence the jury.²

Appeal.—A Verdict on Conflicting Evidence will not be disturbed on appeal.

APPEAL from Superior Court, City and County of San Francisco; A. A. Sanderson, Judge.

Action by Jacob Fogel against the San Francisco and San Mateo Railway Company for personal injuries. From a judg-

¹ Cited and followed in *Waniorek v. United Railroads*, 17 Cal. App. 134, 118 Pac. 952, where the court deprecates drawing from a witness conclusions instead of facts only, and, while admitting there may be exceptional cases, says that where there is doubt it is best to adhere to the rule.

² Cited and followed in *California Wine Assn. v. Commercial Union Fire Ins. Co.*, 159 Cal. 55, 112 Pac. 861, where the plaintiff's counsel, examining a witness, had used the expression "welching insurance companies," and on objection had then withdrawn it.

ment for plaintiff and an order denying a new trial defendant appeals. Affirmed.

Morrison, Stratton & Foerster for appellant; H. I. Kowalsky and A. Everett Ball for respondent.

BELCHER, C.—The plaintiff brought this action to recover damages for injuries to his person alleged to have been caused by the negligence of defendant's servants and employees, in consequence of which he was thrown from one of its moving cars. The answer denied any liability on the part of defendant, and alleged that the injuries sustained by plaintiff "were occasioned by the negligence of said plaintiff in jumping from said car while the same was in motion, and that the said negligence of said plaintiff proximately contributed to the injuries alleged to have been received by him." The case was tried before a jury, and by the verdict plaintiff was awarded damages in the sum of \$1,000, for which judgment was entered. From this judgment, and an order denying its motion for a new trial, defendant appeals.

It was proved on behalf of the plaintiff that the car on which he was riding was going at a greater speed than usual, and that on coming to a switch the front wheels passed on to the switch and the hind wheels remained on the main track; that the car was thereupon brought to a sudden stop, and the plaintiff was thrown off, and, when picked up, was found to be badly bruised and unconscious. John W. Tracy was a witness for plaintiff, and was asked: "Was anybody else thrown off of the car?" He answered: "Yes, sir; a lady." J. J. Kerr was a witness for defendant, and on cross-examination was asked if he saw the plaintiff lying on the ground, and answered that he did. He was then asked: "Did you see anybody else lying on the ground besides this man?" "A. Yes, sir; I saw a lady." "Q. Was she injured?" "A. Not very much. We picked her up." Similar questions were propounded on cross-examination to defendant's witness Conrad Trieber. All of these questions were objected to by defendant upon the ground that they were irrelevant, immaterial and incompetent, and the objections were overruled. It is claimed that the questions objected to were not relevant to the issues presented by the pleadings, and that the testimony as to the injury of the lady tended to prejudice the minds of the

jury against the defendant. The testimony was evidently offered to meet and overcome the defendant's theory that plaintiff's injuries were caused by his own negligence in jumping from the car when it was in motion, and for that purpose it was clearly competent and admissible.

William Craven was a witness for defendant, and testified that he was an oiler on the electric road of the defendant, his business being to oil the switches and curves; that it was his duty to examine the switches, and see that they were in good order, and that on the day the accident occurred he examined the switch where plaintiff was hurt at about a quarter past 6 in the morning and again about 11 o'clock; and that on both of these occasions it was in good order. He was then asked the following questions: "Mr. Craven, was anything omitted that could have been done, that a man of foresight could have advised, or were you as careful as a man could have been to have avoided an accident, on this day?" "Well, now, in your opinion as a railroad man, used to working on railroads, was everything done that could have been done in the matter to obviate or prevent this accident?" Both questions were objected to by plaintiff upon the ground that they were immaterial, irrelevant and incompetent, and the objections were sustained. The rulings of the court were correct; both questions call for the opinion of the witness upon a matter of fact, which was the principal question at issue, and which it was the sole province of the jury to decide.

A physician was called as a witness for plaintiff, and stated that he was called to see him on the day he was injured, and then proceeded to testify as to his injuries and condition. He was asked if he had ever examined the patient in consultation with any other physician, and answered that he had, with Dr. F. S. Cook. Dr. Cook was then called as a witness, and "was examined at length by counsel for plaintiff." During the examination, counsel for plaintiff asked: "I want to know, doctor, what is the present condition, physically, of the plaintiff?" Defendant objected to the question upon the ground that it was irrelevant, incompetent and immaterial, and that the proper foundation had not been laid for a question of that kind. The Court: "Have you examined him lately?" "A. Yes, sir; some five weeks ago." The court then ruled that the witness might tell what he found his condition to be when he examined him physically. It is now claimed that the admis-

sion of the testimony of the witness, against the defendant's objection as to his competency, was error, "in view of the fact that his competency to testify as a medical expert had not been shown." But it does not appear that he was not competent to testify. He was shown to be a physician, and was "examined at length," and the presumption must be that the proper foundation had been laid to enable him to testify as a medical expert.

During the closing argument of counsel for plaintiff to the jury, he remarked, "There is no road in the city and county of San Francisco that has caused so many accidents as this road, as is well known." An exception to the remark was taken by counsel for defendant, and the court said, "I would not repeat it." It is claimed that the remark was improper, and tended to prejudice the minds of the jury against defendant. The judgment cannot, in our opinion, be reversed on this ground. The remark, while improper, appears to have been casual, and there is nothing to indicate that the minds of the jurors were or could have been prejudiced by it against the defendant.

Finally, it is claimed that the evidence was insufficient to justify the verdict, but we think it quite sufficient for that purpose. There was some conflict in the evidence, but that was a matter for solution by the jury and the trial court. The judgment and order appealed from should be affirmed.

We concur: Searls, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

WISE et al. v. WILLIAMS et al.

No. 18,317; November 26, 1895.

42 Pac. 573.

Administrators.—A Finding That a Claim was not Allowed by an administratrix is improper where the only evidence on that issue was the testimony of the attorney of said administratrix, read from a transcript taken on a former trial before another judge, and was to the effect that he signed the allowance at her request and in her presence.

Mortgage.—A Finding That a Mortgage was not Intended to secure a note executed by the mortgagor prior to the mortgage is not sustained by the evidence where it appears that the mortgage was executed to secure a running account, that the amount of said note was charged to the account, that the note was surrendered and a statement of his indebtedness rendered to the mortgagor without objection, that at the time the mortgage was executed the mortgagees had for sale merchandise of the mortgagor of almost equal value with his then indebtedness, and the only testimony of an opposite tendency was that of the mortgagee's bookkeeper, who stated that the "mortgage was not given to secure any special indebtedness," and that said note "was evidently surrendered and a new note taken."

APPEAL from Superior Court, Merced County; Joseph H. Budd, Judge.

Action by John H. Wise and another against J. E. P. Williams and others to foreclose a mortgage. Defendants had judgment, and plaintiffs appeal. Reversed.

Edw. P. Cole and D. H. Whittemore for appellants; T. C. Law for respondents.

SEARLS, C.—Appeal by plaintiffs from a judgment in favor of defendants and from an order denying plaintiffs' motion for a new trial. This is the third appeal in this cause. To the first complaint a demurrer was filed, and sustained by the court, and judgment entered for defendants. On appeal the judgment was reversed (72 Cal. 544, 14 Pac. 204), and the cause remanded for trial. On November 17, 1887, the cause was tried, and judgment rendered in favor of the defendants. An appeal was taken from that judgment, and from an order denying a motion for a new trial. The judgment and order were reversed (88 Cal. 30, 25 Pac. 1064), and the cause sent back for a new trial. On the first appeal it was held by this court that as the complaint showed the demand to have been presented to the administratrix in due time, and to have been allowed by her and approved by the judge in due time, it was not barred by the statute of limitations. Upon the second appeal it was held, among other things, that the presentation and allowance of the claim were in due time, upon the ground that due notice to creditors had not been given prior to such presentation. The facts material to the present appeal are as follows: On the second day of May, 1877, John Connell made to the plaintiffs, copartners under the firm name of

Christy & Wise, his promissory note for \$3,000, payable one day after date, with interest at one and one-half per cent per month, payable quarterly, and if not so paid to be added to the principal and bear like interest, etc. Thereafter, and under date of May 12, 1877, said John Connell and Sarah Connell, his wife, to secure the payment of said promissory note, executed to plaintiffs their mortgage upon certain lands situate and being in the counties of Merced and Stanislaus. The mortgage was duly acknowledged by the wife May 14, 1877, and duly recorded May 18, 1877, in Merced county, and on May 22, 1877, in the county of Stanislaus. Thereafter, and on the twenty-fourth day of October, 1877, John Connell and Sarah, his wife, recorded their declaration of homestead in the county of Merced, upon the property covered by the mortgage. Thereafter John Connell died intestate, and on the nineteenth day of July, 1880, Sarah Connell, his widow, was duly appointed administratrix of his estate, and such proceedings were thereafter had that the homestead was by the court set apart to said Sarah Connell, as the surviving widow of John Connell, and released from administration. According to the complaint, which is denied by the answer, the claim of plaintiffs upon said promissory note and mortgage for \$2,813.69 was duly presented to the administratrix December 21, 1880, allowed by her, approved by the judge of the superior court, and duly filed on said last-mentioned date. Sarah Connell died intestate February 17, 1882, and defendant John Hallinan was duly appointed administrator of her estate. In April, 1883, defendant J. E. P. Williams was appointed administrator of the estate of John Connell. This action was commenced in August, 1883, and all claim against the estate of John Connell, except upon the mortgaged premises, was expressly waived. Defendant John Hallinan, as administrator of the estate of Sarah Connell, and as guardian of John B. Connell, minor son of John and Sarah Connell, deceased, answered. Williams, the administrator of John Connell, did not, so far as appears, answer the complaint. The cause was tried by the court without a jury, and written findings filed. Several of these findings are attacked as being unsupported by and as contrary to the evidence. Two or three only of these findings need be examined.

The tenth finding is, in substance, that the plaintiffs did not on the twentieth day of December, 1880, or at any other time,

present their claim to Sarah Connell, administratrix of the estate of John Connell, deceased, or to any administrator thereof, and that no claim of plaintiffs was ever allowed or approved by the administratrix or by any administrator of the estate. It having been held upon the former appeal that the presentation of the claim on December 20, 1888, was in time, the only question now to be considered is whether or not the evidence shows a presentation on that day, and an allowance by the administratrix. The only evidence on this point was the testimony of E. Jackman, who was the attorney for the administratrix, and had his office in Merced. His testimony, as well as all the other testimony in the case, was, by stipulation, read from the transcript of the evidence taken on a former trial before a different judge. He says, in substance, that the claim was sent to him by plaintiffs, and he presented it to the administratrix at his office; that she had just come into town on a wood wagon, and, when requested to sign her name to the allowance, she said she was tired, excited and sick, and he (the witness) wrote her name at her request, and that she placed her mark thereto, as he thought, though, from the lapse of time, he did not remember especially as to the mark which was placed between the words upon the paper, thus: "Sarah Connell, X, by E. Jackman." The witness added, in answer to the question as to her having placed her mark after the name, that, to the best of his knowledge and belief, she placed it there. The following is the entire indorsement: "The within claim presented to Sarah Connell, administratrix of said deceased, is allowed and approved for \$2,813.69, this 20th day of December, 1880. [Signed] Sarah Connell, X, by E. Jackman." This indorsement is preceded by the title of the court and cause, and is followed by the order of allowance and approval of the superior judge. Whether or not Mrs. Connell made the mark to her signature is a matter of no consequence. Jackman is shown by the evidence to have signed her name at her request and in her presence, and that was sufficient. Under such circumstances, the finding of the court referred to cannot be upheld. While the trial court has the right to refuse to believe the testimony of a witness, though not directly contradicted, that right is not to be arbitrarily exercised. If the witness is a credible person, and his testimony is not inherently improbable, nor opposed to other circumstances in proof, nor in any way contradicted, it ought

to be accepted. As the judge of the court below did not see the witness on the stand, and had, so far as appears, no better opportunity than we have of estimating his credibility, and as we are unable to discover any inherent improbability in his testimony, we think it not improper to hold that this finding is not justified by the evidence.

The other findings demanding attention are the third and eleventh, the former of which finds that the mortgage was not given to secure the promissory note for \$3,000, but that said note and mortgage were given to secure the payment of the account due plaintiffs on their ledger, amounting to \$1,249.62 and no more, and for such other amounts as might thereafter be due them from John Connell on ledger account. The eleventh finding is to the effect that plaintiffs have been paid in full long before the commencement of this action, and prior to the death of Sarah Connell, in February, 1882. The propriety of this last finding depends upon the correctness of the third. The allowance of plaintiff's claim on the twenty-first day of December, 1880, for \$2,813.69, is *prima facie* evidence that such sum was then due, but was not conclusive against the heirs of John Connell, deceased, who could, under section 1636 of the Code of Civil Procedure, show that the claim was not properly allowed. It was so held on the former appeal in this case: 88 Cal. 35, 25 Pac. 1064. The books of plaintiffs were in evidence, and showed, as found by the court, that on the second day of May, 1877, there was a balance due thereon to plaintiffs from John Connell of \$1,249.62. Between that date and June 25, 1877, this balance was increased to \$2,552.94. A single item going to make up this balance constitutes the only subject upon which there can be, in the light of the evidence, any doubt. It is an entry, of June 25th, of a charge, on account of "bills receivable," of \$2,009.46. The evidence tends to show that this amount was due upon an old note held by plaintiffs against John Connell, which was surrendered by the holders. It also tends to show that a statement of account was rendered to Connell on June 25, 1877, with this item charged, and again December 31, 1877, and, so far as appears, no objection was ever offered to the balance as rendered. The only evidence which can be relied upon by the respondents to sustain the contention that this item was not included in the sums to secure which the mortgage was given is to be found in the testimony of W. P. Gerlach, a witness on the part of

the plaintiffs, who had been their bookkeeper during the period in which the account with John Connell was made, and who, upon the point in question, was interrogated as follows: "Q. This amount here in Exhibit H1, 'By balance of account rendered, \$2,552.94,' to what does that refer? A. To the account sent June 25, 1877. Mr. Connell did not have credit on the ledger for the note or mortgage sued on. That note and mortgage does not affect the ledger account. There was no other indebtedness from John Connell, outside of this running account, and the note and mortgage were given to secure any balance there might be on the books. The plaintiffs took the note and mortgage to secure any balance due from time to time—to secure the running account, but not to cover any special indebtedness; to secure the amount due from John Connell at the time, and any amount that might thereafter accrue. In the account of June 25, 1877, the entry of note for \$2,009.46 was a note then due from Mr. Connell to Christy & Wise, and was evidently surrendered, and a new note taken." The court below must have concluded from the expression of the witness, "The plaintiffs took the note and the mortgage to secure any balance due from time to time—to secure the running account, but not to cover any special indebtedness," that the witness intended to convey the idea that the note for \$2,009.46 was not so secured. We do not so understand the witness. By the term, "but not to cover any special indebtedness," the witness, judging from the context, simply meant that the note and mortgage in suit were given, not to secure a special or specific sum of money, but the balance then or thereafter to become due, whatever it might be. The witness cannot be understood to have meant to except specialties or a specialty from the indebtedness secured, for the reason that the note for \$2,009.46 was not a specialty, in the technical sense, and none are shown to have existed, except it may be the mortgage sought to be foreclosed. And when the witness said this particular note "was evidently surrendered, and a new note taken," he must have referred to the note in suit, as there is no evidence of any other notes in the case. Again, when viewed in the light of the probabilities of the case, we think the conclusion reached must be the same. On May 14, 1877, plaintiffs credited John Connell with \$1,235.20, the net proceeds of wool sold by them for him. It is reasonable to suppose that this wool had been in plaintiffs'

hands at least as early as the date of the mortgage (May 12, 1877), and before its acknowledgment. If this is correct, then plaintiffs, if the note for \$2,009.46 was not included in the indebtedness secured by the mortgage, must have taken such mortgage when there was a balance due them, in excess of the value of the wool on hand, of only some \$14.42—a sum so small as not to warrant the expense of a mortgage. It is true that, in view of future advances to be made, careful business men might exact a mortgage in advance; but the same care would be likely to exhibit itself by securing a present indebtedness—something tangible and real—as well as a future and contingent one. The conclusion that the note in question was not included in the balance intended to be covered by the mortgage, founded, as it is, solely upon what at most was but an indefinite expression of the witness, was not, in view of the conduct of all the parties, and in view of the *prima facie* case in plaintiffs' favor made by the account as allowed, and in the face of the evidence furnished by the books of plaintiffs, sufficient to warrant the finding that the note and mortgage in suit were given to secure the sum of \$1,249.62, and no more, of the then present indebtedness. It must follow that if the \$2,009.46 was secured by the note and mortgage of May, 1877, there is still something due the plaintiffs over and above all payments made; and hence the judgment and order appealed from should be reversed and a new trial ordered.

We concur: Vanciel, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are reversed and a new trial ordered.

HAIGHT v. SEXTON.

No. 15,843; November 30, 1895.

42 Pac. 637.

Appeal—Conflicting Evidence.—A Finding by the Trial Court on evidence in which there is no substantial conflict will not, on appeal, be disturbed.

Trial—Finding on Issue Outside Pleadings.—A reversal of a judgment cannot be had because a finding was made on an issue outside the pleadings, where other findings in the cause are sufficient to support it.

Insolvency.—Where, in an Action by an Assignee in insolvency for possession of property, defendant claims under a bill of sale, a finding that defendant procured it by fraud is proper as a fact bearing on defendant's right to possession, though the issue of fraud is not raised by the pleadings.

APPEAL from Superior Court, City and County of San Francisco; Charles W. Slack, Judge.

Action by Robert Haight, assignee, against David T. Sexton. From a judgment for plaintiff and an order denying a new trial defendant appeals. Affirmed.

Sullivan & Sullivan for appellant; Alex T. Vogelsang and I. I. Brown for respondent.

PER CURIAM.—Action by an assignee in insolvency to recover possession of goods and chattels as the property of the insolvents. It is mainly urged that the findings of the trial court that the insolvents were entitled, at the date of the adjudication of insolvency, to the possession of the property, and that defendant had no right thereto, is not supported by the evidence; but we are constrained to hold against such contention. While the evidence is such as to make the impression upon our minds that the court below might well have found to the contrary, and that such finding would have been clearly sustained by the evidence, there is nevertheless to be found in the record evidence tending to support the view taken by the trial court of a character to raise a substantial conflict upon the point; and under the well-established rule obtaining in such cases we are not at liberty to disturb the findings.

As to the finding that defendant procured the delivery of the bill of sale, under which he claimed to hold the property, to be made to him by fraud and misrepresentation, it may be conceded, as contended by appellant, that it is without any issue in the pleadings, and therefore erroneous. But it is an error which cannot avail appellant, since the other findings in the case fully support the judgment, and the finding objected to becomes immaterial. As we regard it, however, the

finding should be taken more in the nature of a probative fact from which the court deduced the ultimate fact that defendant was not entitled to the possession of the property. In this view it was not improper, there being evidence tending to support it.

We perceive no prejudicial error in the rulings of the court upon the objections made to the introduction of the record in the insolvency proceedings; nor upon the ground as to the authority of the assignee to maintain the action. Independently of the question as to the power of the court to direct the assignment to be made by the clerk nunc pro tunc, we think the authority of the assignee was sufficient to entitle him to maintain an action for the mere possession of the property. The judgment and order are affirmed.

NEWELL v. STEELE et al.

No. 16,012; November 30, 1895.

42 Pac. 637.

Appeal—Review—Evidence.—A judgment based on conflicting evidence will not be disturbed.

APPEAL from Superior Court, City and County of San Francisco; William T. Wallace, Judge.

Action by Emily S. Newell against Mary J. Steele and others. From a judgment for plaintiff and order denying a new trial defendants appeal. Affirmed.

William H. Jordan for appellants; James G. Maguire and W. C. & L. G. Burnett for respondent.

PER CURIAM.—This is an appeal by defendants from the judgment and an order denying a new trial in a case wherein plaintiff was awarded damages for a withdrawal of lateral support, and consequent injury to her property; and the single question presented is whether the evidence supports the findings, the contention being that it does not. It would be profitless to state the evidence, or advert specially to the views of counsel for appellants in his very able and ingenious effort

to sustain his contention, since it is clear to us, after a very careful examination of the evidence, that the fact which, under the settled doctrine of this court, bars us from reversing a case upon the facts—a substantial conflict in the evidence—is presented by the record. This conflict is sharply defined upon the two main issues—that of previous reasonable notice of defendants' intention to make the excavation complained of, and the exercise of reasonable care in doing the work; and while, upon the question of damages suffered, we are inclined to think the lower court adopted rather extreme figures, in view of the testimony of most of plaintiff's own witnesses, there is evidence to sustain this finding as well, and it cannot therefore be disturbed. The judgment and order are affirmed.

FLICK et al. v. BELL.

Sac. No. 11; December 6, 1895.

42 Pac. 813.

Parol License—Revocation.—A Land Owner Orally Granted B a License to construct a reservoir and lay pipes on his land to convey water from a certain spring, in consideration that B would give him the right to use such water in case of fire, and would so construct the reservoir as to enable him to take water therefrom in case of fire. There was no agreement as to the time they should be maintained. B afterward expended \$1,500 in improvements, which were used by him and such land owner. Held, that the land owner, or his grantees with actual notice, could revoke such license only on condition that the licensee should be permitted to remove his improvements, if it could be accomplished without material loss, or, if not, that the licensor should make just compensation therefor.¹

APPEAL from Superior Court, Shasta County; Edward Sweeny, Judge.

Action by Carl Flick and others against Joseph E. Bell to enjoin defendant from removing certain water-pipes and destroying a certain reservoir situated on plaintiffs' land, to

¹ Cited and followed in *Wallace v. Dodd*, 136 Cal. 211, 68 Pac. 693, a case where a mortgagee, previous to foreclosure, had disclaimed intention to hold on to nursery stock on the premises. It was held he was estopped after the period of redemption had expired.

adjudge that defendant had no right or claim to such pipes and reservoir, and to quiet plaintiffs' title thereto. From a judgment for defendant and from an order denying their motion for a new trial plaintiffs appeal. Affirmed.

Frank W. Smith and L. V. Hitchcock for appellants; Aaron Bell, Clay W. Taylor and J. Chadbourne for respondent.

HAYNES, C.—This suit was brought by appellants to enjoin the defendant from removing certain water-pipes and destroying a certain reservoir situate upon the lands of appellants, and to adjudge that respondent has no right or claim to said pipes and reservoir, and to quiet plaintiffs' title thereto. The answer of defendant alleged that in 1890 one Samuel Gruber was the owner in fee and in the possession of the lands, described in the plaintiffs' complaint; that defendant then desiring to construct said reservoir and lay said pipes for the purpose of conveying water from a certain spring, and using the same for power and other useful purposes, upon respondent's premises, in the town of Shasta, applied to said Gruber for the right, license, and privilege to construct said reservoir and lay said pipes in and upon said land; that Gruber, in consideration that the defendant would give him the right to use water from said reservoir in case of fire, and would so construct the reservoir, with trapdoors and openings, as to enable him to take water therefrom in case of fire, orally granted defendant the right, license, and privilege to construct said reservoir and lay down said pipes; that defendant agreed to the terms and conditions imposed by Gruber, and constructed said reservoir and laid said pipes, and that said Gruber and defendant used and continued to use and enjoy the same uninterruptedly until said Gruber conveyed said land to plaintiffs, in August, 1892; that plaintiffs purchased said lands with full and actual notice and knowledge thereof; that defendant constructed said reservoir and laid said pipes, and that the same belonged to and were the property of defendant; and that, ever since the purchase and occupation of said lands by plaintiffs, defendant has continued to use and enjoy said reservoir and pipes in the same manner as before, down to the commencement of this action, without objection and with the acquiescence of plaintiffs. The answer further alleged that plaintiffs have never revoked

said right, license and privilege, nor attempted to rescind said agreement so made and entered into by said Gruber and defendant. The findings followed the allegations of the answer, and judgment was entered for the defendant for costs. The appeal herein is by the plaintiffs, from said judgment, and from an order denying their motion for a new trial. The errors specified go to the sufficiency of the evidence to sustain the findings, and to certain alleged errors in the admission and rejection of testimony, and that the findings do not support the judgment.

As to the first and second findings of fact, it is sufficient to say that the evidence is conflicting, and these findings therefore cannot be disturbed. As to the third finding, to the effect that plaintiffs had not revoked the rights, privileges or license granted by Gruber to the defendant, nor given any notice of their intention to do so, nor taken any steps to rescind the agreement for which said rights and privileges were granted, it is contended by appellants that the conveyance of the lands by Gruber to the plaintiffs was a revocation of the license, and that the beginning of the present action is evidence of the revocation of any right, privilege, or license existing prior thereto; and this finding, and the further contention on the part of the appellants that the pipe and reservoir became part of their land, and that respondent has no right to remove the same, present the principal questions in the case.

The excavation for the reservoir in question was ten by fourteen feet, and five feet in depth, and was walled up with stone and cement. From the spring to the reservoir there is about two thousand five hundred feet of pipe, part of it one and one-fourth inches, and the remainder one and three-fourths inches, in size; and from the reservoir to defendant's place in the town of Shasta, where the water is used, there is eight hundred or nine hundred feet of pipe. At the time the excavation was commenced, defendant supposed the place selected was upon the townsite. Finding that he was upon Gruber's land, he obtained permission, as the court found, to proceed with and complete the work, upon condition that he would provide means of access to the reservoir, so that, in case of fire, Gruber might use the water. This condition the defendant complied with. At the time the license was given by Gruber, the defendant had expended about \$100, and about

\$1,500 more was expended in completing the work. There does not appear to have been any agreement or understanding as to the length of time the pipe-line or reservoir should be maintained. That an unexecuted parol license may be revoked by the licensor at any time, either expressly, or by a conveyance of the premises to be affected thereby, or that his death will so operate, is clearly settled; but, as to executed parol licenses, the decisions in the different states are not only conflicting, but incapable of being reconciled. One line of cases holds that a parol license to be exercised upon the land of another creates an interest in the land, is within the statute of frauds, and may be revoked by the licensor at any time, no matter whether or not the licensee has exercised acts under the license, or expended money in reliance thereon. Another line of cases holds that the licensor is deemed to be equitably estopped from revoking the license after permitting the licensee to perform acts thereunder, or to make expenditures in reliance upon the license. In *Flickinger v. Shaw*, 87 Cal. 126, 22 Am. St. Rep. 234, 11 L. R. A. 134, 25 Pac. 268, it was held that an executed license may become an agreement for a valuable consideration, and where the revocation of the license would operate as a fraud upon the licensee, who has expended money and made improvements upon the faith of it, equity will hold the owner of the land as a trustee *ex maleficio*, to prevent such revocation; and in *Grimshaw v. Belcher*, 88 Cal. 217, 22 Am. St. Rep. 298, 26 Pac. 84, it was held that, "in cases where the revocation of the license would be a fraud, courts of equity give a remedy, either by restraining a revocation, or by construing the license as an agreement to give the right, and compelling specific performance"; and the following authorities from other states more or less directly support the conclusion reached in those cases: *Clark v. Glidden*, 60 Vt. 702, 15 Atl. 358; *Morton Brewing Co. v. Morton*, 47 N. J. Eq. 158, 20 Atl. 286; *Southwestern R. R. Co. v. Mitchell*, 69 Ga. 114; *Cook v. Pridgen*, 45 Ga. 331, 12 Am. Rep. 582; *Curtis v. Water Co.*, 20 Or. 34, 10 L. R. A. 484, 23 Pac. 808, and 25 Pac. 378; *Nowlin v. Whipple*, 120 Ind. 596, 6 L. R. A. 159, 22 N. E. 669; *Saucer v. Keller*, 129 Ind. 475, 28 N. E. 1117; *Pierce v. Cleland*, 133 Pa. 189, 7 L. R. A. 752, 19 Atl. 352; *Lee v. McLeod*, 12 Nev. 280. Coming to the case before us, if the license given by Gruber to the defendant is revocable

unconditionally, at his pleasure, or that of his successors in interest, and upon such revocation the personal property placed by defendant upon the licensor's land becomes his property, it follows that Gruber might have revoked the license the moment the defendant had completed the work, and before he had enjoyed for a single day the fruits of his labor and the expenditure of his money. Such revocation, followed as it must be (upon the theory of appellants) with the absolute forfeiture and loss of defendant's labor and property, would shock the sense of justice of every right-minded man, and would be a stain upon the administration of justice. Nor is it necessary, in order to do justice, to hold that the license given by Gruber amounted to a grant of any interest in the land, nor, upon the other hand, to hold that the license is not revocable at the pleasure of the licensor; but in such cases equity may impose, as a condition of such revocation, that the licensee may remove his improvements, if that can be accomplished without material loss, or, if not, that the licensor shall make just compensation therefor, as the circumstances of the case may require. The license given by Gruber having been executed by the defendant at large expense, the plaintiffs, having purchased with notice of the facts, are in no better position than Gruber, who granted the license. Their action was not brought for the purpose of revoking the license upon such terms as equity might impose, but for the purpose of depriving the defendant, not only of the use of the improvements under the license, but of all right of property in the improvements, and of appropriating the same to their own use, without compensation to the defendant. The evidence of Tucker and Hocking was properly admitted, as it tended to prove the fact that a license was given by Gruber.

Appellants' contention, that "the issue presented by the pleadings as to whether or not the pipe and reservoir had been attached to and become a part of the real estate" should have been found by the court, is not sound. That is a conclusion of law from the facts, and as such was found by the court. We find in the record no ground upon which the judgment and order should be reversed, and advise that they be affirmed.

We concur: Britt, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

MUTTER v. I. X. L. LIME CO.

No. 15,891; December 20, 1895.

42 Pac. 1068.

Evidence—Rebuttal.—Where the Defense in an Action for Cutting Wood was that plaintiff agreed to pile it for measurement, but failed to do so, and defendant's foreman testified that the wood was not in condition to be measured, it was error to permit a witness called in rebuttal to testify that he had a conversation with said foreman after the suit had commenced, and that said foreman told the witness that the wood could be easily measured, as, if said testimony was intended to impeach said foreman's testimony, it was improper, because no foundation had been laid.

Evidence—Declaration of Agent.—If Intended to Prove that the wood was in condition to be measured, it was improper, because the declaration of an agent under such circumstances cannot bind his principal.

APPEAL from Superior Court, Santa Cruz County; J. H. Logan, Judge.

Action by Clement Mutter against the I. X. L. Lime Company, a corporation, to recover for work and labor performed. Plaintiff had judgment and defendant appeals. Reversed.

Lucas F. Smith and Chas. B. Younger for appellant; Z. N. Goldsby for respondent.

BELCHER, C.—Plaintiff brought this action to recover from the defendant the sum of \$1,599, with interest thereon from June 1, 1892. The complaint contains three counts. In the first count it is alleged that the defendant is indebted to the plaintiff in the sum of \$434 for cutting, at its special instance and request, two hundred and fifty cords of pine wood at one dollar per cord, and two hundred and thirty cords of redwood at eighty cents per cord. In the second count it is alleged that the defendant is indebted to the plaintiff in the sum of \$1,165, balance due for cutting and delivering, at its special instance and request, twelve hundred and four and three-fourths cords of wood at \$2.15 per cord, and for cutting twenty-two and one-half cords of heading bolts at one dollar and ten cents per cord, and that the cutting and

delivering of said wood and the cutting of said bolts were reasonably worth the prices named. The third count is the same as the second, except that it alleges that defendant promised and agreed to pay plaintiff, at the rates aforesaid, upon the first day of each and every month, for all wood cut and delivered and all bolts cut by plaintiff during the previous month. The answer denies most of the averments of the complaint, and alleges that, before the commencement of the action, defendant had paid plaintiff the sum of \$1,449.96, in full satisfaction of all wood cut and delivered by him to it. The case was tried by the court without a jury, and the findings were that the defendant was indebted to the plaintiff, upon the causes of action set up, in the sum of \$1,456.99, for which sum and costs judgment was entered. The defendant moved for a new trial, which was denied, and has appealed from the order.

It is claimed for appellant that several errors were committed by the court in its rulings upon the admission of evidence, and that the findings were not justified by the evidence, and hence that the order should be reversed. It is not necessary to notice all of the rulings complained of, as most of them were, in our opinion, correct, but one of them, we think, was clearly erroneous. The plaintiff was a witness in his own behalf, and testified: That he made an agreement with Mr. Blum, the superintendent of the defendant company, to do the work for which he sought to recover under the first count of his complaint, and that in pursuance of the agreement he commenced cutting the wood in November, 1891, and finished the cutting in March, 1892. That he could not tell exactly how much wood he cut, but it was about four hundred cords. That "Mr. Blum agreed to measure the four hundred cords in January, and he didn't come. The four hundred cords were to be paid for as soon as it was put up in the woods where I cut it. He agreed to pay when it was done, and he didn't come up to measure it. . . . By March 4th it was all cut. It was to be all paid for by the 4th of March. . . . Mr. Blum said he would come in January, and pay for what they had cut, but he didn't come, but come in March, and he didn't measure, or do nothing. . . . It was agreed between Mr. Blum and myself that, when the wood was cut and put up, it should be measured and paid for. . . . This four hundred cord lot of wood was in a condition last spring—April, May,

and along at that time—to be measured, so as to ascertain the amount there was there.” Joseph Krater was also a witness for plaintiff, and testified that he was present when Mutter agreed with Blum to cut that wood. “Blum promised to measure it in January, and pay for it then. Mutter finished cutting that lot of wood in the month of March, 1892. I do not know how much there was of that wood. The four hundred cords were to be measured on the ground where it was chopped.” I. Blum was a witness for defendant, and testified that he was the superintendent of the defendant company, and that he made a contract with the plaintiff for the so-called four hundred cord lot of wood mentioned in the plaintiff’s first cause of action. “The agreement was that Mutter was to cut this wood, and pile it properly for measurement. He was to notify the company when it was ready for measurement. The four hundred cord lot had not been measured or hauled to the lime-kiln up to the seventeenth day of June, 1892 [the day when the complaint was filed]. Plaintiff did not notify the defendant that the wood was ready for measurement. . . . There was no specified number of cords mentioned to be cut. I told him the place where to cut the wood. I was to pay him one dollar for pine, and eighty cents for redwood. He was to cut all the wood in that locality, and pile it in merchantable order, so it could be measured. The time of payment was after the wood was measured and hauled in, then the amount hauled was to be paid for the succeeding month on the company’s regular pay day. It was agreed that, when we wanted the wood, we would measure it and haul it, and then pay for it the succeeding month, at the company’s regular pay day. We were to make arrangements to haul the wood as soon as it was measured and as soon as it could be hauled. We were not to haul anything except what was measured up to that time. The company’s pay day was on the fifteenth of each month.” M. Hickey was a witness for defendant, and testified that he was foreman of the defendant company, and that he “heard Mutter state what his contract with Blum was in reference to the four hundred cord lot; he told me he was to put up four hundred cords of wood—so much pine, so much redwood—and after he got it out the company was to measure it, and it was to be paid for when it was delivered at the kilns. I went up there and looked at the wood, and it was not piled so it could be measured. This was

in April, 1892. It was piled in all kinds of shapes. I could not explain it, really, but it was crossways and lengthways. It was not compact. It was piled too loosely. Some of it was not piled at all. I could not measure it. About the 31st of August, 1892, I went with Cerf, Mutter and Spellman to measure this wood. At that time it was in a little better condition, because they had repiled some of it, and Mutter agreed to take our measurement, which he had refused to do before that time. I have reference to what you call the four hundred cord lot. I saw this lot of wood in April, 1892. It could not then be measured. No man living could measure it accurately. Up to the bringing of this suit, the wood was in such condition that it could not be measured accurately. The plaintiff never demanded of the defendant payment for this four hundred cords of wood, or any part thereof, up to the bringing of this suit. It had not been measured or hauled at that time. The plaintiff told me that it was to be paid for when it was measured and hauled to the lime-kilns."

George Ley was called by plaintiff as a witness in rebuttal, and stated: "I had a conversation with Hickey about the four hundred cords. He was the foreman of the lime company." He was then asked, "What did he tell you?" The question was objected to on the ground that it was incompetent, immaterial, irrelevant, not in rebuttal, and hearsay. The objection was overruled, and an exception reserved. The witness answered: "He was talking about the four hundred cord lot. He said that wood could be measured easy enough, if they only wanted to measure it; that he had measured lots of worse wood than that was—worse put up than that was." The witness further said that this statement was made to him since the suit was brought, and that no one but Hickey and himself was present. The objection to the question should have been sustained. Whether the wood was in condition to be measured before the suit was brought was a material issue in the case, and was sharply contested; there being evidence upon the question, other than that above referred to, introduced upon both sides. If the purpose of the evidence sought to be elicited was to impeach the witness Hickey, it was clearly inadmissible, because the proper foundation for it had not been laid: Code Civ. Proc., sec. 2052. And if the purpose was to prove that the wood was in fact in condition to be measured, and should have been measured, before the suit was brought, it was in-

admissible, because the declarations of an agent do not bind the principal unless they are made during the continuance of the agency, and are a part of the *res gestae*. To be admissible, they must be in the nature of original, and not of hearsay, evidence; and must be made, not only during the continuance of the agency, but in regard to a transaction depending at the very time: *Clunie v. Lumber Co.*, 67 Cal. 313, 7 Pac. 708; *Beasley v. Packing Co.*, 92 Cal. 388, 28 Pac. 485; *Birch v. Hale*, 99 Cal. 299, 33 Pac. 1088. For the error noted, the order should be reversed and the cause remanded for a new trial.

We concur: Searls, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order is reversed and the cause remanded for a new trial.

WHITE et al. v. ADLER.

No. 18,357; December 20, 1895.

42 Pac. 1070.

Venue—Joinder of Personal and Local Actions.—An action upon a contract whereby defendant was to pay a certain sum for land in case the title thereto was satisfactorily cleared, or to reconvey the land if the title was not so cleared, the complaint, praying for relief in the alternative, is not within Code of Civil Procedure, section 392, providing that actions for the recovery of real property must be tried in the county where the land is situated, but is within section 395, providing that in all other cases the action must be tried in the county in which the defendants reside.¹

APPEAL from Superior Court, Yolo County; W. H. Grant, Judge.

Action by W. C. White and others against Moses Adler upon a contract to pay the purchase price of land, or reconvey the same to plaintiffs. From an order denying his motion to change the place of trial defendant appeals. Reversed.

¹ Cited with approval in *Peninsular Trading & F. Co. v. Pacific Steam Whaling Co.*, 123 Cal. 697, 56 Pac. 607, where with other cases it is given to illustrate decrees of equity courts acting in *personam* and only collaterally in *rem*.

Reinstein & Eisner for appellant; Frank H. Smith for respondents.

PER CURIAM.—This action was commenced in the superior court of Yolo county, and was based upon a written contract executed by the plaintiffs, as parties of the second part, and by the defendant, as party of the first part. The contract was dated May 28, 1892, and the material parts of it read as follows: "Whereas, a conveyance has this day been made by said parties of the second part to said party of the first part of certain lands [describing eighty acres of land situate in Yolo county], the title of which eighty acres is defective, and the payment for which has not been made by said party of the first part: Now, it is mutually understood and agreed that said parties of the second part will clear the title to said land, satisfactorily to said party of the first part, within twelve (12) months from this date; and should said title, within said time, be made satisfactory to said party of the first part, he will pay to said parties of the second part the sum of two thousand two hundred (\$2,200) dollars in U. S. gold coin; and, should said title not be so as aforesaid made satisfactory to said party of the first part, then said party of the first part will reconvey said land to said parties of the second part, at the expiration of said twelve (12) months, free of cost to said second party." The complaint alleges "that, within twelve months from the date of said agreement, these plaintiffs took steps to, and endeavored to, clear the title to said land satisfactorily to said Adler, and to make the title to said land satisfactory to said Adler, and plaintiffs are informed and believe, and therefore allege, that plaintiffs did clear the title to said land, and quiet the same in said Adler; that plaintiffs have furnished defendant with a complete abstract of all the steps taken by them affecting said title, which said abstract contains an abstract of everything of record affecting the title to the said tracts of land upon the records and files of said Yolo county; that defendant has refused to state, and still refuses to state, whether or not the title to said land is now satisfactory to him or not; that said defendant, although demand has been made upon him by plaintiffs, has refused, and still refuses, to either pay to plaintiffs the said sum of \$2,200, or to reconvey to said plaintiffs the said land." And the prayer of the complaint is for the judgment and de-

cree of the court "that defendant specifically perform his said contract, and, according to the terms thereof, either pay said sum of \$2,200, or, in case said title is not satisfactorily cleared and quieted according to the true intent and meaning of said contract, reconvey said land to plaintiffs, and for such other and further, or other or further, relief as may be proper." In due time the defendant, upon proper notice, demand and affidavit, moved the court that the place of trial of the action be changed from the county of Yolo to the city and county of San Francisco, upon the ground that at the time the action was commenced he was, and ever since has been, a bona fide resident of said city and county. The court denied the motion, and, from the order made, defendant appeals.

Section 392 of the Code of Civil Procedure provides: "Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial, as provided in this code: (1) For the recovery of real property, or of an estate or interest therein, or for the determination, in any form, of such right or interest, and for injuries to real property." And section 395 of the same code provides: "In all other cases the action must be tried in the county in which the defendants, or some of them, reside at the commencement of the action." The meaning and import of these sections were under consideration in the case of *Smith v. Smith*, 88 Cal. 572, 26 Pac. 356, and it was there said: "The general spirit and policy of the statute is to give to the defendant the right of having all personal actions against him tried in the county of his residence. Provision is made for the trial of actions affecting real estate in the county where the land is situated, and for the trial of certain other designated actions in the county where the cause of action arose; but the general rule for the place of trial is prescribed by section 395, by the declaration that 'in all other cases' the action must be tried in the county in which the defendant resides at the commencement of the action. . . . The plaintiff cannot, by uniting in his complaint matters which form the subject of a personal action with matters which form the subject of a local action, compel the defendant to have both those matters tried in a county other than that in which he resides. It is only when real estate alone is the subject matter of the action that the provisions of section 392 can be invoked against

a defendant who resides in a county different from that in which the land is situated. If, in his complaint, the plaintiff join with such a cause of action another which is not embraced in its provisions, or if he also seeks a remedy against the defendant upon matters which are not embraced within the provisions of this section, his action becomes one of those 'other cases' provided for in section 395, which the defendant is entitled to have tried in the county of his residence." If it be conceded that the subject matter of this action is the land, still it is evident from an inspection of the complaint that the primary object of the action is to recover \$2,200, the purchase price thereof, and not to obtain a reconveyance. The plaintiffs might have sued for the money alone, without asking for any alternative relief. They were, however, not satisfied with such an action, but chose to join with it a cause of action for a reconveyance. By so doing they united in the complaint "matters which form the subject of a personal action with matters which form the subject of a local action," but the defendant was not thereby deprived of the right to have the action tried in the county of his residence. Upon the authority of *Smith v. Smith*, supra, the order appealed from is reversed and the court below is directed to make an order changing the place of trial from the county of Yolo to the city and county of San Francisco.

STIMSON MILL CO. v RILEY et al.*

L. A. No. 3; December 20, 1895.

42 Pac. 1072.

Mechanics' Liens.—The Fact That the Building Contract, in providing for the payments, retains, until thirty-five days after the completion of the work, slightly less than the twenty-five per cent of the contract price required by statute, does not render the owner personally liable for all labor and materials furnished, especially when more than twenty-five per cent was in fact actually retained.

Mechanics' Liens.—When the Building Contract Provides for payments as the work progresses, payments made when the work has been substantially finished to the required stages cannot be consid-

*Rehearing denied.

ered premature, so as to subject the owner to liability to materialmen to the additional extent of the payments so made.

Bond—Necessity of All Parties Signing.—Where a bond is in form joint and several, the failure of all the parties named in the instrument as obligors to sign the bond does not render it void.

Mechanics' Liens.—An Allowance of Attorneys' Fees in an action to enforce mechanics' liens will not be set aside as insufficient unless clearly unreasonable.

APPEAL from Superior Court, Los Angeles County; Lucien Shaw, Judge.

Actions by the Stimson Mill Company, a corporation, and by one Duncan, against Spurgeon V. Riley and others. The cases were consolidated, and from the judgment plaintiff the Stimson Mill Company appeals. Affirmed.

H. A. Barclay for appellant; D. K. Trask and E. C. Bower for respondent.

BELCHER, C.—This action was instituted to foreclose twelve liens for labor and materials furnished and used in the construction of a house for the defendant Riley, the several claims, including costs of recording, aggregating in amount the sum of \$1,728.86. One of the said liens was for materials furnished by the plaintiff, and the others were duly assigned to the plaintiff. One Duncan also commenced an action to foreclose a lien for labor done by him on the building, of the value of \$25, and the two actions were consolidated and tried together. The contract, under which the building was constructed, was executed by Riley, as owner, and J. H. Cummins, as contractor, on October 10, 1893, and was duly recorded. It provided that Cummins should do all the work and furnish all the materials necessary to complete the building according to the plans and specifications made by Charles W. Davis, architect, for the sum of \$2,180. It further provides that the payments, so far as need be stated here, should be made as follows: (4) When ready for plastering, \$250; (5) when first coat of plastering is finished, \$250; (6) when white coat of plastering is finished, \$250; (7) when whole work completed and accepted by architect, \$300; balance, \$530, usual thirty-five days, "provided, that in each of the said cases a certificate be obtained and signed by the said Chas. W. Davis that he has done his work so far as done to his satisfac-

tion, and also a statement of the value of the work so done by him." Accompanying the contract was a bond, as required by section 1203 of the Code of Civil Procedure, which was signed by S. C. Dodge, one of plaintiff's assignors, and R. A. Buchanan, but not by Cummins. It reads: "Know all men by these presents, that we, the undersigned, . . . do hereby jointly and severally guarantee the faithful performance of the above contract, and the delivery of the said building to Spurgeon Riley, Esq., free from all liens that may be filed against the contractor on the above contract, not exceeding the sum of five hundred and forty-five dollars, that may accrue against him by reason of the nonfulfillment of the said contract by the said J. H. Cummins, the contractor aforesaid. We further agree that he will pay all his subcontractors, laborers, and materialmen all of the moneys that may become due them by reason of labor or materials under this contract. We hereby guarantee to them the payment in full of all their claims, and hold ourselves responsible to them in the sum of five hundred and forty-five dollars, or so much as may be necessary of the said sum to pay them in full of all labor and materials furnished for said building, exclusive of the contract price of the same." It is alleged in the complaint, among other things, that at least twenty-five per cent of the whole contract price was not, by the terms of the contract, made payable at least thirty-five days after the final completion of the contract; that the first, fourth, fifth, and sixth payments were made by Riley to Cummins before they became due according to the terms of the contract; and that \$750 is a reasonable sum to be allowed plaintiff as attorneys' fees in the action. Wherefore plaintiff prayed judgment against the defendant Cummins for the several sums specified, aggregating \$1,728.86; that it be allowed an attorney's fee in the sum of \$750; and that the said several sums be adjudged and decreed to be liens upon the land and building described, and that the same be sold, and the proceeds applied, etc. Cummins suffered his default to be entered. Riley appeared and answered. The answer set out the contract and accompanying bond and the work done thereunder. It denied that any payment was made before it became due, and alleged that each and every payment was made upon the certificate of the architect as provided by the contract. It also denied the right of the plaintiff to recover on the lien of S. C. Dodge, for the

reason that Dodge was estopped from claiming or maintaining any lien against said building by the covenants of the said bond, whereby he obligated himself that the contractor would complete his contract according to its terms, and deliver the house to defendant free of liens and charges. It also admitted that there was still in defendant's hands money due and unpaid under the contract amounting to the sum of \$870; and it asked that an order be made permitting the defendant to deposit the said sum in court, subject to the further direction of the court. The case was tried, and the court found, in effect, that the said contract was a valid and binding contract between the parties; that the first payment of \$150 was made before the same became due; that the fourth, fifth and sixth payments were not made before the same became due; that plaintiff was not entitled to recover anything upon the cause of action assigned to it by S. C. Dodge, except as against the defendant Cummins; that \$25 was a reasonable sum to be allowed Duncan as an attorney's fee, and \$75 was a reasonable sum to be allowed plaintiff as an attorney's fee; that Duncan and the plaintiff were each entitled to recover of the defendant Cummins the amount of their respective liens, together with their costs and attorneys' fees as aforesaid, and interest as prayed for, and were entitled to recover of the defendant Riley the sum of \$1,020, being the \$870 which was deposited in court and the \$150 which was prematurely paid, and also the cost of verifying and recording their liens and their attorneys' fees and costs of suit, which said several sums were declared to be liens on the land and building described. In accordance with the findings a judgment and decree of foreclosure was entered, from which, and from an order denying its motion for a new trial, the plaintiff Stimson Mill Company appeals.

The principal points made for a reversal are: (1) That the court erred in deciding that the contract was valid and binding, when, by its terms, twenty-five per cent of the whole contract price was not made payable at least thirty-five days after the final completion of the contract. (2) That the court erred in deciding that the fourth, fifth and sixth payments were not made before they became due. (3) That the court erred in deciding that the plaintiff was not entitled to enforce the lien for the claim of S. C. Dodge. (4) That the court erred in allowing plaintiff only \$75 as an attorney's fee.

As to the first point: It appears that the sum reserved for the last payment was \$15 less than twenty-five per cent of the whole contract price. The statute (Code Civ. Proc., sec. 1184) provides that the contract price shall be made payable in installments, or on the completion of the work, "provided, that at least twenty-five per cent of the whole contract price shall be made payable at least thirty-five days after the final completion of the contract"; and that, "in case such contracts and alterations thereof do not conform substantially to the provisions of this section, the labor done and materials furnished by all persons except the contractor shall be deemed to have been done and furnished at the personal instance and request of the person who contracted with the contractor, and they shall have a lien for the value thereof." It will be observed that this section does not declare the contract void in case it fails to conform substantially to its provisions, but only imposes a penalty upon the owner by making him personally liable, and his improved property subject to liens, for the labor and materials done and furnished; and it was so held in *San Diego Lumber Co. v. Wooldredge*, 90 Cal. 574, 27 Pac. 431. In that case the contract made the last payment due thirty days after the final completion of the contract, and not thirty-five days, as required; and it was held that the plaintiff was not injured by the nonconformity, and the penalty had not been incurred; the court saying that in such cases "every reasonable intendment is indulged to avoid a penalty." So in *Yancy v. Morton*, 94 Cal. 558, 29 Pac. 1111, the contract provided that thirty-five days after the completion of the building twenty-five per cent of the contract price should be paid, "provided that payment may be made at any time between the date of completion and the said thirty-five days, in case said contractors show receipts and give special bonds that all bills will be paid, and that no liens or other claims exist against said premises; such payment to be optional with the owner." It was held that this was in substantial conformity with the requirement of the code, and was sufficient. In this case it would seem that the parties to the contract intended to have twenty-five per cent of the whole contract price reserved for thirty-five days after the completion of the building, and that the failure to do so arose unintentionally from some mistake of figures in apportioning the amounts of the several installments to be paid earlier. This is shown by the contract,

which expressly provides that the money is to be paid "in the manner following, that is to say: seventy-five per cent of said sum of two thousand one hundred and eighty dollars as said work progresses, and in sums proportionate to the value of the work done from time to time by said second party in sums as follows." The court below was of the opinion that the contract was in substantial compliance with the requirements of the statute, and that the deficiency of \$15 was so trivial that, in view of the whole amount of the last payment, and the consequences to the owner if it is held not to be a substantial compliance, the maxim, "*De minimis non curat lex*," should be applied. It is a settled rule that courts of equity are always reluctant to enforce penalties, and every reasonable intentment is indulged to avoid them. Here it clearly appears that the appellant was in no way injured by the small deficiency in the amount reserved for the last payment, since much more than twenty-five per cent of the contract price was in fact reserved and paid into court for the use and benefit of the lien claimants. Under these circumstances we think the decision of the court below upon this point was right, and that it should be upheld.

As to the second point: The house constructed under the contract had a bath-room, which was seven by twelve feet in size and twelve feet in height. It was wainscoted up five feet from the floor, and had a window and door and transom over the door. At the times when the three payments complained of were made the bath-room was not entirely lathed or plastered, but it was partially lathed when the fourth payment was made, and partially plastered when the fifth and sixth payments were made. It was proved that it would take one man five or six hours to complete the lathing and plastering. Mr. Davis, the architect, testified: "I issued an architect's certificate for each payment that was made on this building before the payment was made, upon my own authority, as the architect of the building. At the time of issuing each certificate I personally examined the building, and know that the building was at each time completed to the stage authorizing the payment to be made." There is no pretense that the certificates were obtained by fraud or collusion, but it is claimed that, because the bath-room was not fully lathed and plastered when the payments were made, the owner should be subjected to the penalty of paying the money—\$750—a second time.

Here, again, it appears that the defect relied on was trivial, and that to sustain appellant's claim would work out an injustice and wrong, which should be avoided, if possible. In section 1187 of the Code of Civil Procedure, it is provided that every person save the original contractor, claiming the benefit of the chapter in regard to liens, must file his claim of lien within thirty days after the completion of any building, improvement or structure, or after the completion of the alteration, addition to, or repair thereof, and that "any trivial imperfection in the said work, or in the construction of any building, improvement or structure, or the alteration, addition to or repair thereof, shall not be deemed such a lack of completion as to prevent the filing of any lien." The rule thus declared as to the filing of liens should, we think, in reason and equity, be applied to the payment of the installments of the contract money. All that the law requires is a substantial compliance with the terms of the contract and good faith on the part of the owner. It must follow, therefore, that the court properly found that the fourth, fifth, and sixth payments were not prematurely made.

As to the third point: It is claimed for appellant that the bond executed by Davis was void, because not signed by Cummins, and in support of this position *Sacramento v. Dunlap*, 14 Cal. 421, and *People v. Hartley*, 21 Cal. 585, 82 Am. Dec. 758, are cited. The cases cited are not in point. In each of those cases the bond sued upon was in form the joint bond of the principal and sureties, and not joint and several, and was signed only by the sureties. It was held that under such circumstances no recovery could be had on the bond. And see *Weir v. Mead*, 101 Cal. 125, 40 Am. St. Rep. 46, 35 Pac. 567, where the authorities upon the subject are reviewed. Here the bond in question was in form joint and several, and in *Kurtz v. Forquer*, 94 Cal. 91, 29 Pac. 413, a similar bond, which was executed for a like purpose, was held valid and binding. Whether the execution of the bond by Dodge should be held to operate as an estoppel against him and his assignee from enforcing his claim against Riley, it is unnecessary to determine. The claim was assigned to and was owned by the plaintiff, and judgment against Cummins was entered in favor of plaintiff for the aggregate of all its claims. And, without

including the Dodge lien, liens were foreclosed for sums more than sufficient to exhaust all the money remaining unpaid and due from Riley. If, therefore, the court erred in refusing to foreclose the Dodge lien, the error was harmless, and the plaintiff was in no way aggrieved thereby.

As to the fourth point: The code provides that the court must allow a reasonable attorney's fee to the lien claimant. What is a reasonable fee is a matter to be determined by the trial court, and its action will not be disturbed on appeal unless it appears that the sum allowed is clearly unreasonable. The record only shows that the trial of the case occupied a portion of four days, but how much of each day does not appear. While the sum allowed seems rather small, we cannot say that the court abused its discretion in determining that \$75 was a reasonable fee.

Certain rulings of the court upon the admission of evidence are specified in the statement as erroneous, but they are simply referred to in appellant's brief without argument. On examination of the record we fail to discover any material error in any of the rulings referred to, and therefore pass them by without special notice. The judgment and order appealed from should be affirmed.

We concur: Britt, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

WARDLAW v. CALIFORNIA RAILWAY COMPANY.

No. 15,880; December 23, 1895.

42 Pac. 1075.

Carriers—Injury to Passenger in Boarding Car.—Where a passenger goes on the side of a platform car opposite the platform, and not at the place arranged to receive passengers, and attempts to climb on the train from between the cars, and in so doing places his foot on the bumper, where it was injured by the engine moving up to

couple the train, he is guilty of contributory negligence, and cannot recover.¹

Negligence—When a Question for Court.—Where the facts are undisputed and the inference of negligence is irresistible, the question is one of law for the court.

APPEAL from Superior Court, Alameda County; John Ellsworth, Judge.

Action by James J. Wardlaw, by James Wardlaw, his guardian ad litem, against the California Railway Company. Judgment of nonsuit and plaintiff appeals. Affirmed.

Cross, Hall, Ford & Kelly for appellant; Chickering, Thomas & Gregory for respondent.

SEARLS, C.—This action is brought to recover damages from the defendant, a corporation, and a carrier of passengers by railroad, for personal injuries sustained by the infant plaintiff, while boarding defendant's car, at Fruitvale, in the county of Alameda. At the trial, and upon the close of the evidence on the part of plaintiff, counsel for defendant moved for a nonsuit, upon the ground that the evidence of the plaintiff showed that he, the said plaintiff, was guilty of contributory negligence. The motion was granted by the court, and judgment entered in favor of defendant for costs. Plaintiff excepted in due form, and prosecutes this appeal from the judgment of nonsuit, and assigns the granting of the motion for nonsuit as error.

It was admitted at the trial that plaintiff was, at the date of the accident, of the age of about eighteen years, and that James Wardlaw had been duly appointed his guardian. Also, that the defendant corporation owned and operated a steam railroad in the county of Alameda, together with engines, cars, etc., running between the villages of Fruitvale and Laundry Farm in said county, and was a common carrier of passengers for hire over said railroad. The testimony of plaintiff was to the effect that on Sunday, May 21, 1893, he purchased a

¹ Cited and followed in *Robinson v. Helena Light & Ry. Co.*, 38 Mont. 243, 99 Pac. 844, where, as the court say, "the plaintiff undertook to board the car at a moment when he knew it was not at its proper place, from a direction from which he could not be seen, and without notice to the motorman or conductor so that they could look after his safety."

ticket in San Francisco for Laundry Farm, and in company with a party of young friends rode on the Southern Pacific cars to Fruitvale, at which point the road of defendant begins. The cars of defendant were what plaintiff terms picnic cars, and were platform cars, with a railing around them and seats extending across. The parties were going to a private picnic and approached the rear end of the train, as we must infer from the fact that the engine was at the other end, but probably not attached to the train. Upon approaching the train, which stood in front of defendant's depot, plaintiff passed forward upon the right-hand side of the cars, looking forward, and, seeing no steps, he attempted to climb on a car at the end where it was attached to another car, by putting his foot upon a brakebeam, his hands on the platform, and swinging himself up, so that he placed his other foot upon the bumper just in time to have it caught between the bumpers and crushed as the engine started the cars back and pressed them together, probably in coupling onto the train. Plaintiff heard no bell, whistle or other signal from the engine. After his injury, plaintiff saw that, on the other or left-hand side of the car (on the depot side) there was an opening in the railing of the car, and steps by which to ascend to it. On cross-examination plaintiff said, among other things: "I cannot handle myself as well as a boy who has the full use of his limbs. I never have been able to. I have to be careful. I cannot get around as easily as other boys, and know that perfectly well. This is only on account of being fleshy. Am not injured in any other way." There were several other witnesses on the part of the plaintiff, from whose testimony it is to be inferred that the Laundry Farm train came in about the time plaintiff and his party of about thirty persons arrived at the station. The train came down the track with the engine in advance, which engine was switched to a sidetrack and run back to be attached to the other end of the train, at which time plaintiff and some three others of the party attempted to board the car on the right-hand side, and between the ends of two cars. The witnesses concur in stating: (1) That they heard no signal from the engine as it backed down and coupled on the train. (2) That the depot was on the left-hand side, and that there were steps and facilities for boarding the cars on that side, and none on the other, and that ample time was given for passengers to board the train. (3) The cars were

ordinary platform freight cars, with a railing constructed around them, except with an opening on the left-hand side, and steps for the entry and exit of passengers, and a cover over the top. (4) There is no evidence tending to show that defendant knew or was aware of the position of plaintiff when it attached its engine to the train. (5) At the moment of plaintiff's injury it is to be inferred the cars were simply crowded together by the shock of attaching the engine. John Noriega, a witness, at folio 44 of the transcript, says: "I felt the shock of the car just as though the engine had been hitched on, and then heard the scream."

The sole question in the case is this: Was there such evidence of contributory negligence on the part of the plaintiff as to preclude a recovery, conceding the defendant to have been negligent? Negligence, though variously defined, may be said to be "the failure to do what a reasonable and prudent person would ordinarily do under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done": *Railroad Co. v. Jones*, 95 U. S. 439, 24 L. Ed. 506. "Contributory negligence, in its legal signification, is such an act or omission on the part of a plaintiff, amounting to a want of ordinary care, as, concurring or co-operating with the negligent act of the defendant, is a proximate cause or occasion of the injury complained of": *Beach on Contributory Negligence*, sec. 7. It is the duty of a railway company, as a common carrier of passengers, to keep its stations and the approaches thereto in such a condition that those having occasion to use them for the purposes for which they are designed may do so with safety. So, too, the duty devolves upon it of preparing all proper means of ingress and egress to and from its cars devoted to the carriage of passengers. This duty performed by the railway company, the reciprocal duty devolves upon one who would take passage by the cars to use his natural faculties in selecting such means and place of access thereto as have been provided for that purpose, and as promise immunity from danger. Not to do so is evidence of negligence on the part of the passenger, and where, as in the present case, the plaintiff went upon the side of the car opposite the platform, and presumably not the place arranged to receive

passengers, and, finding no place of access, attempted to climb upon the train from between the cars, with the barrier of a railing before him to be scaled when he reached the level of the car floor, and in so doing placed his foot upon the bumper, where it was caught by the connecting car, pressed back by the engine moving up to couple on the train, but one inference can be drawn from the facts, and that is that he was guilty of such negligence as is denominated negligence in law.

As a general proposition, cases of negligence (to which those of contributory negligence form no exception) present a mixed question of law and fact, in which it devolves upon the court to say, as matter of law, what is or amounts to negligence, and upon the jury to determine, as matter of fact, whether or not, in the particular case, the facts in proof warrant the imputation of negligence. Where, however, the facts are undisputed, and the inference of negligence is irresistible and not open to debate, doubt or rational difference of opinion, the question becomes one of law to be passed upon by the court: *Dufour v. Railroad Co.*, 67 Cal. 319, 7 Pac. 769; *Long v. Railroad Co.*, 96 Cal. 269, 31 Pac. 170; *Jamison v. Railroad Co.*, 55 Cal. 593; *Van Praag v. Gale*, 107 Cal. 438, 40 Pac. 555; *Maumus v. Champion*, 40 Cal. 121; *Davis v. Button*, 78 Cal. 247, 18 Pac. 133, and 20 Pac. 545; *Meeks v. Railroad Co.*, 52 Cal. 602; *Glascock v. Railroad Co.*, 73 Cal. 137, 14 Pac. 518; *Holmes v. Railway Co.*, 97 Cal. 161, 31 Pac. 834. That plaintiff's negligence was the proximate cause of his injury needs no argument, and there is no evidence of wanton or willful negligence to bring it within the purview of that class of cases of which *Esrey v. Pacific Co.*, 103 Cal. 541, 37 Pac. 500, is a fair sample. The gist of that case is involved in a single paragraph, as follows:

"The party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered responsible."

In the present case there is nothing to indicate that defendant had any knowledge of the perilous position of plaintiff. Its negligence consisted in backing its engine against the train without a warning signal, and for this negligence plaintiff is not entitled to recover because of his own negli-

gence, without which no harm would have come to him. The judgment appealed from should be affirmed.

We concur: Vancief, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

KROUSE v. WOODWARD et al.

No. 15,972; December 31, 1895.

42 Pac. 1085.

Corporate Stock.—One Who Purchases Stock from a Bailee who, by the indorsed assignment, is made the apparent owner thereof, will be protected as against the bailor, though the stock stood on the corporation books in the latter's name.

APPEAL from Superior Court, Santa Clara County; W. G. Lorigan, Judge.

Action by Charles Krouse against John A. Woodward and others to recover certain shares of stock. From the judgment entered plaintiff appeals. Affirmed.

W. C. Kennedy and Wilcox & Patton for appellant; Jackson Hatch, E. M. Roosenthal and S. F. Leib for respondents.

TEMPLE, J.—This is the same case as that already decided on the appeal of Woodward (Krouse v. Woodward, 110 Cal. 638, 42 Pac. 1084). The plaintiff has also appealed from that part of the judgment which denies him relief against Alexander and against the defendant corporation. The judgment is clearly right. By the indorsed assignment he made Woodward the apparent owner of the stock; and, when the court found that Alexander was a purchaser in good faith and for value, plaintiff had lost his case against Alexander. It did not matter that the stock stood on the books in plaintiff's name. These indorsed certificates do pass from hand to hand, and such is a usual mode of selling stock. The judgment in favor of Alexander is affirmed.

We concur: McFarland, J.; Henshaw, J.

PEOPLE v. KNIGHT.

Crim. No. 42; December 31, 1895.

43 Pac. 6.

Rape—Testimony by Physician.—On a Prosecution for rape, a physician who testified for the prosecution that penetration would produce the condition of the parts discovered by his examination could be cross-examined as to whether all such conditions could not have been caused by other things, though he had stated that a certain instrument would cause certain of the conditions.

Rape—Cross-examination of Prosecutrix.—Where, on a prosecution for rape, prosecutrix testified that she was seven years of age when she came to the state, and that at the time of trial she was ten years of age, and on cross-examination stated that she did not know when she came to the state, she could be asked by defendant what she gave as her age to her school teacher after coming to the state.

Rape—Cross-examination of Prosecutrix.—Where, on a prosecution for rape of one who lived with defendant and his wife, prosecutrix testified that the reason she did not complain until several days after the offense was committed was because defendant had made her afraid of him by throwing things at her and scolding her, questions put to her by defendant to determine when this treatment commenced should have been allowed. In such case she could be cross-examined as to whether defendant ever said anything to her about having intercourse with her.

Rape—Cross-examination of Prosecutrix.—In such a case, prosecutrix having testified that the wife went out and left her alone in the house with defendant, and that she was afraid of him, she could be asked on cross-examination why she did not go out with the wife.

Rape—Cross-examination of Prosecutrix.—On a trial for rape, under an indictment alleging several acts of intercourse with one who lived with defendant and his wife, after prosecutrix testified that she was compelled by threats of the wife to tell her of the offenses, and that the wife suspected it from finding her trembling, she could be cross-examined as to whether the wife saw her trembling after the first offense or after the last, or how many times she saw her thus.

Rape—Evidence.—On a Trial for Rape of One Who Lived with defendant and his wife, where a physician, who examined prosecutrix twelve days after the offense, testified that the hymen was entirely absorbed, and that, from indications, it might have disappeared long before, and prosecutrix testified that her only excuse for not

making immediate complaint was her fear of defendant, prosecutrix could be cross-examined as to whether any person had intercourse with her before defendant, especially where defendant claimed that the charge was concocted by his wife.¹

Rape—Evidence of Concocted Charge.—Where, on a prosecution for rape, defendant claims that the charge was concocted by his wife, it is error to exclude circumstantial evidence to support that claim.

Rape—Outcry.—On a Prosecution for Rape of a ten year old child, an instruction asked by defendant on the question whether the child made any outcry at the time of the commission of the crime is properly refused.

APPEAL from Superior Court, Kern County; A. R. Conklin, Judge.

Jesus Knight was convicted of rape, and from the judgment and an order denying him a new trial he appeals. Reversed.

E. Rousseau and E. J. Emmons for appellant; W. F. Fitzgerald, attorney general, for the people.

HAYNES, C.—Appellant was convicted of the crime of rape and sentenced to imprisonment at Folsom for the term of nineteen years; and he now appeals from said judgment, and from an order denying his motion for a new trial. The offense is charged to have been committed upon Felis Aldama, a girl of ten years of age, the granddaughter of appellant's wife. Appellant complains of numerous rulings of the court below upon questions of evidence, and of alleged errors in instructions given and refused, and also specifies as a ground of reversal that the evidence was not sufficient to justify the verdict.

Drs. Rogers and Taggart made a physical examination of the prosecuting witness some time after the last alleged outrage, but how long after is uncertain. The examination was made on September 7, 1894. Trinidad Grijalba, the officer who arrested defendant, and who appears to have made the complaint, first heard of it, as he "guesses," on September 2d, but how long before that date the last of the four alleged acts of intercourse occurred is not precisely fixed. The girl

¹ Cited with approval in *Baden v. State*, 57 Tex. Cr. 295, 122 S. W. 556, which was a similar case.

testified upon the trial that she told her grandmother "about a week after the last time," but how long a time elapsed after she told her grandmother before it was communicated to Grijalba nowhere appears. Assuming that it was communicated to Grijalba at once, at least twelve days elapsed after the last of the four occurrences before the examination was made by the physicians. The physicians testified to certain conditions of the parts as they found them at the time of the examination, and both concluded that the producing cause must have occurred some time before the examination, but how long they could not tell. Dr. Rogers was asked by the district attorney whether penetration by a man would cause such bruises and inflammation as he found, and he answered, "Yes; on a child of that age." He was afterward cross-examined by counsel for defendant, and that was followed by a redirect examination by the district attorney. Counsel for defendant, upon recross-examination, asked the following question: "All of the spots, and the disappearance of the hymen, and all the irritation you saw there, could have been made by various other things, could it not?" This question was objected to as being incompetent, irrelevant, and immaterial, and not proper cross-examination. The Court: "I think that question has been answered once. Let the objection be sustained. Gentlemen, you cannot cross-fire on a witness this way." It is true, some questions had been put to the witness partly covering the points of the above interrogatory. One went only to the red spots testified to by the doctor, and another to the use of a particular instrument—the finger; and, as to the latter, the doctor replied that it would not cause the injuries. The question here, however, covered all the injuries and appearances, and embraced every instrument or means of producing the injuries, aside from that which the prosecution sought to prove by the witness had caused it. The objection to the question should have been overruled.

Felis Aldama, the prosecuting witness, testified that she was born in Lower California, where her parents still reside; that she was seven years old when she left there; that since she came to this state she had lived part of the time with an aunt, and the remainder of the time with her grandmother; and that she was ten years old. None of these facts, except her age, and that she lived with her grandmother, were brought

out on the examination in chief, which was exceedingly brief, and which gave no hint of the time when the occurrences to which she testified took place—not even the year in which they occurred. Under these circumstances, counsel for the defendant asked when she first came to Sumner, but she was unable to tell. She was then asked as to whether she went to school, and to whom she went, and, having named a teacher, was asked the following question: "What age did you give her as your age when you went to school—when she took your age down?" An objection to this question was improperly sustained by the court.

The witness gave as a reason for not telling her grandmother what had occurred that she was afraid; that she was afraid of him before these occurrences; that "he was always scaring me and my grandma, and making us afraid"; "he was always scolding us and throwing things at us." She was then asked, "When did he first commence throwing things at you?" and to this question an objection was sustained. Several other questions, of a similar character, put for the purpose of ascertaining when the defendant's bad treatment commenced, were also excluded. "Q. Did he ever talk to you about having anything to do with you?" An objection to this question was also sustained. Again, the witness testified that her grandmother went out, and left her in the house with the defendant, and that she was afraid to stay with him, and was then asked, "Why did not you go out with your grandmother?" An objection to this question, and to others of similar import, were also sustained. She further testified, upon cross-examination, that she told nobody but her grandmother. "Q. Did she say anything to you that made you tell it? A. Yes, sir. Q. What did she say? A. She told me she mistrusted something, and why didn't I tell her, and she wanted me to tell her. Q. Did she threaten you? A. Yes, sir. Q. Did she take out a knife, and threaten to kill you with it? A. Yes, sir. Q. What did you do that made her think there was something wrong? A. Because she found me trembling in the kitchen. Q. Did she see you trembling that way after the first time?" To this question it was objected that it was incompetent, irrelevant and immaterial, and calls for a conclusion. The Court: "It calls for a fact, but, whether the fact has any bearing on the case or not, let the objection be sustained. We must get through with

this case sometime." Objections were also sustained to each of the following questions: "Did she ask you whether or not there was anything the matter with you after the first time? Did she discover there was anything the matter with you until after the fourth time? How many times did she say she found you trembling?" We think all these questions were proper, and that the rulings of the court were erroneous, and unreasonably restricted the cross-examination of the witness. An objection was also sustained to the following question to this witness upon cross-examination, "Had anybody else done so before?" It is true that, if the defendant had committed the act charged, the fact that someone else had done so before would be wholly immaterial. But Dr. Rogers had testified to certain conditions of her person, and, among other things, he was asked the following question: "In regard to no appearance of the hymen, would that indicate recent rupture, or a long time before? A. It was entirely absorbed, and that might have disappeared before. The indications are that it would have disappeared before. The margins of the rupture had entirely disappeared." So far as can be determined from the testimony of the girl, the alleged acts of intercourse with the defendant followed each other with intervals of only a few days; and, if viewed solely in the light of the evidence of the doctor, it is by no means clear that the question was either immaterial or irrelevant. Besides, she testified that she did not tell her grandmother because of her fear of the defendant; and if, in reply to the question, she had admitted that the defendant was not the first person who had intercourse with her, and she had not disclosed the fact, it would go far toward discrediting her statement of the reason for not informing her grandmother of defendant's conduct. Or if, on the other hand, she had disclosed such prior assault by another, and if the claim of defendant's counsel that this prosecution was incited by the grandmother of the child without cause, the condition of the child as found by the doctor, though produced by another, could readily be used to fasten the crime upon the defendant. In view of these facts which may have existed, and not because the prior crime of another absolved the defendant, if he were in fact guilty, the objection should have been overruled.

In regard to defendant's effort to introduce evidence that the charge against him was concocted by his wife, the grand-

mother of the child, the court and counsel seem to have misunderstood each other from the beginning to the end. Under some of the propositions of counsel, the evidence should have been admitted, and, under some of the statements of the court, it might have been admitted. The colloquy is too long to be stated here, but one or two paragraphs may be stated: At folio 142 counsel said: "We want to prove that the grandmother has concocted the story, and has trained this child to swear to it. We don't suppose we can prove all those things, but, from what we think we can prove, we want the jury to infer the rest." We suppose that counsel meant that he could prove certain circumstances, from which the main fact must or might be inferred. In other words, he confessed his inability to prove by direct evidence the ultimate fact, but that he expected to be able to prove it by circumstantial evidence. The fact itself being material and relevant, any evidence, whether direct or circumstantial, tending to prove the ultimate fact, was competent. In one of the statements of the court, reference was made to the question of a conspiracy between the grandmother and the child, but a subsequent statement shows that the court did not use the word "conspiracy" in the sense that the child aided in concocting the story. The court said: "If you state to the court that your intention is to connect this child with it, either as an active participant, or an instrument in the hands of the grandmother, I will permit that question. Mr. Rousseau: I will make this statement about it, that we cannot prove the actual training, but we can prove it from the circumstances only. The Court: Do you propose to show to this jury that the grandmother has educated the child up to this story? Mr. Rousseau: Yes; I cannot show the actual training. The Court: Then it is an inference you want the jury to draw? Mr. Rousseau: Yes; it is an inference. The Court: Let the objection be sustained." Other parts of the colloquy, which covers several pages of the transcript, show that, when counsel said he could not show the "actual training," he meant that he did not have direct or primary evidence of the fact. One step in the proposed evidence was the alleged jealousy of the grandmother, the wife of the defendant. What other facts counsel expected to show, tending to sustain the alleged training of the child, does not appear. His offer, however, embraced in his statements above quoted was proper, and he should have been allowed to intro-

duce any competent evidence, whether direct or circumstantial, which tended to prove the ultimate facts stated.

In relation to the instruction requested by defendant touching the point whether the girl made any outcry, it need only be said that, being under the legal age of consent, her consent to the act could not change its character. If it were shown that she did cry out, it would, of course, tend to corroborate her story, while the failure to do so would not necessarily show that the defendant was not guilty, since her silence would, in the absence of other circumstances, only tend to show her consent. It may be said, however, that her condition, as testified to by the physicians, would render it highly improbable that these acts could have been perpetrated without producing such pain as to cause her to cry out, unless prevented by threats or other means; and, while such circumstances would furnish proper grounds for an argument to the jury, it is not perceived that any proposition of law is involved, making an instruction directly upon the point necessary, while all that could be properly said was covered by the more general instructions given.

Questions touching the affidavits presented in support of the motion for new trial need not be noticed, in view of the conclusion we have reached. The judgment and order appealed from should be reversed and a new trial granted.

We concur: Vanclef, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are reversed and a new trial granted.

OSTERMAN v. DISTRICT GRAND LODGE NO. 4,
I. O. B. B.

No. 15,974; January 21, 1896.

43 Pac. 412.

Endowment Benefit—Pleading—Burden of Proof.—A mutual endowment society, by alleging in its answer to an action to recover an endowment that the conditions of the contract, made by its law conditions precedent to recovery, have been fulfilled by the assured,

"except as hereinafter set forth," assumes the burden of alleging and proving nonperformance of such conditions by the assured.¹

Endowment Benefit—Suspension and Forfeiture.—Where the Laws of a mutual endowment association make suspension for nonpayment of dues a forfeiture of membership benefits, and provide a formal method for suspension in such case, nonpayment of dues will not, ipso facto, work a forfeiture, though the assured was secretary of the society, and formal proceedings for suspension have not been had because he failed, as required, to report his own delinquency.

Endowment Benefit—Payment.—In an Action by a Wife Against a grand lodge—whose laws made membership in a subordinate lodge, and an election as member of the endowment fund, conditions precedent to a right to participate therein—to recover an endowment on her husband's membership, it appeared that, on report of the husband's death to the grand by the subordinate lodge, the grand lodge sent the amount due to the subordinate lodge, to be paid, "through the trustees," to plaintiff; that the trustees, prior to its receipt, obtained from her an order to deduct from the amount due sufficient to make good defalcations of her husband, which, as one of them testified they told her, would amount to at least \$1,000. The wife testified that they said it would be about \$500. The trustees subsequently obtained her receipt for the whole amount, on representations that it was necessary to procure the money from the defendant. Plaintiff, failing to receive the money, demanded it from defendant, and defendant, then first learning that plaintiff's husband was not in good standing at his death, directed the trustees of the subordinate lodge to return the amount sent to it. There was no evidence what became of this money, except that it was deposited in the bank by the trustees to whom it was delivered. Held, that a finding against defendant's plea of payment was warranted.

Endowment Benefit—Action—Parties.—Under the above facts, the grand lodge, and not the subordinate lodge, was the proper party to be sued.

Endowment Benefit.—In an Action for an Endowment Benefit, where defendant alleges in defense that plaintiff consented that the money due should be applied in paying a sum embezzled by the assured, and that it was so applied, an instruction placing the burden of proving such issue on defendant is proper.

APPEAL from Superior Court, City and County of San Francisco; John Hunt, Judge.

¹ Cited and approved in *Sterling v. Head Camp etc. Woodmen of the World*, 28 Utah, 522, 80 Pac. 380, where in the same connection the court say, "The maxim that 'equity regards that as done which ought to have been done' can here have no application."

Action by Sarah Osterman against District Grand Lodge No. 4, Independent Order of B'nai B'rith, to recover an endowment benefit. From a judgment for plaintiff and an order denying a new trial defendant appeals. Affirmed.

Marcus Rosenthal for appellant; Joseph Rothchild for respondent.

VANCLIEF, C.—Action to recover an endowment benefit of \$2,000 alleged to be due the plaintiff from the defendant. The cause was tried by a jury, whose verdict was in favor of plaintiff for the sum demanded, and the judgment of the court was in accordance with the verdict. The defendant appealed from the judgment and from an order denying its motion for a new trial. The pleadings and evidence justified the jury in finding the following facts: The defendant is a fraternal and beneficial society incorporated under the laws of this state, is governed by a written constitution, and, for certain general purposes, has jurisdiction over subordinate lodges within its district. Subject to the constitution of the defendant, each subordinate lodge adopts its own by-laws governing its own finances and local affairs. The defendant corporation maintains a special fund, called the "Widows' and Orphans' Beneficiary Fund," supported by assessments of all members of subordinate lodges who elect to become participants of the benefits of that fund, each of whom is required, by the law relating to that fund, to pay a monthly assessment of \$2.50, to be collected by the subordinate lodges, and transmitted to the District Grand Lodge; and, after so transmitted, the subordinate lodge has no power of control over it. Funds for the support and use of the subordinate lodges are supplied by fines and quarter-yearly dues required to be paid by their members, over which funds the Grand Lodge has no control. Only those members of subordinate lodges who elect to become participants in the widows' and orphans' beneficiary fund are assessed for contributions to that fund; and, after so electing, they are called "Members of the Widows' and Orphans' Fund." The laws of the District Grand Lodge governing the disposition of the widows' and orphans' fund, among other things, provide (section 15): "The sum of two thousand dollars shall be paid on the death of a member in good standing in the widow and orphan beneficiary fund of

this district, to his widow; if there be no widow, then to his children; and, if there be no widow or children, then to any person, persons, or institutions which the deceased member may designate in the manner prescribed in the following sections." No endowment policy or certificate is issued to a member during his life. The benefit is to be paid upon due notice to the District Grand Lodge of the death of a member of the widows' and orphans' beneficiary fund. Upon such notice the Grand Lodge, by its secretary, ordinarily transmits the money, or a check for it, to the trustees of the subordinate lodge of which the deceased was a member, directing them to pay it to the beneficiary. Ophir Lodge No. 21 is, and has been since 1880, a subordinate lodge of defendant Grand Lodge. In October, 1881, Monroe Osterman, the husband of the plaintiff, became a member of Ophir Lodge, and of the widows' and orphans' fund, and continued to be such until his death, on the twenty-ninth day of May, 1891, and, during the last three years of his life, was the secretary of said Ophir Lodge. As a member of said Ophir Lodge and of the widows' and orphans' branch of said District Grand Lodge, he was in good standing up to the time of his death, unless, for alleged reasons, to be hereinafter considered, he had lost his good standing, and had not been reinstated at the time of his death. Immediately after the death of Monroe Osterman, Ophir Lodge duly notified the Grand Lodge of the fact. Thereafter, on June 30, 1891, the treasurer of the Grand Lodge drew a check on the Bank of California for \$2,000, payable to the order of the trustees of Ophir Lodge, which was sent to them by the grand secretary, inclosed in the following letter, dated July 1, 1891:

"To the Secretary of Ophir Lodge, No. 21, I. O. B. B.:

"Worthy Sirs and Brothers: We herewith transmit check for the sum \$2,000 in payment of the amount due the late brother, Monroe Osterman. This amount is to be paid to the widow, through the trustees. This is accompanied by an original and duplicate receipt.

"Fraternally, yours,

"LOUIS BLANK,

"Grand Secretary."

The trustees received the check, and on July 8, 1891, deposited it with the California Safe Deposit and Trust Company. On August 12, 1891, the plaintiff, claiming that her

benefit had not been paid, made a written demand of the Grand Lodge for payment thereof, to which demand that lodge answered, in substance, that she was not entitled to any benefit, for the reason that her husband was not at the time of his death a member in good standing of either the Ophir Lodge or of the widows' and orphans' fund, because of his failure to pay certain dues to the Ophir Lodge, and certain assessments for the widows' and orphans' fund, and thereafter, on September 4, 1891, directed the Ophir Lodge, by the following letter, to return the money:

"September 4, 1891.

"Ophir Lodge, No. 21:

"Brothers: Information has reached the general committee of the Grand Lodge No. 4 that Brother Monroe Osterman, of Ophir Lodge, died May 27, 1891; was in arrears to the widows' fund at the time of his death, and therefore not entitled to the benefits of the widows' fund. As the Grand Lodge transmitted to you a check for the sum of \$2,000, to be paid to the widow of said Brother Osterman, and as, under our laws, the said widow would not be entitled to the benefits of the widows' fund, and said money was transmitted to your lodge while we were ignorant of the fact of his delinquency, and therefore the money was improperly paid, we now herewith direct your lodge to at once return to the grand secretary, Louis Blank, \$2,000.

Yours, fraternally,

"LOUIS BLANK,

"Grand Secretary."

Such additional facts as may be considered pertinent will be stated in considering the points to which they relate. The defendant lodge pleaded two distinct defenses: First, that by reason of nonpayment of dues to the Ophir Lodge, and assessments for the widows' and orphans' fund, Monroe Osterman was not in good standing, as a member of the Ophir Lodge, at the time he died; and, second, that the defendant, nevertheless, paid the full amount of her benefit to the plaintiff.

1. It was admitted by defendant, at the trial, that Monroe Osterman was ostensibly in good standing, as a member and the secretary of the Ophir Lodge, up to the time of his death, and that there was not even a suspicion that he was delinquent in payment of his dues or assessments until after the Grand Lodge had transmitted to Ophir Lodge \$2,000 to pay his

widow's benefit, and also that he was never expelled nor suspended from membership in Ophir Lodge or the widows' and orphans' beneficiary fund by any action of the Ophir or Grand Lodge. But counsel for appellant contends that his delinquencies, ipso facto, deprived him of his good standing as a member of the widows' and orphans' fund, without any formal act of suspension or expulsion by either lodge, and consequently deprived the plaintiff of the right to any benefit from that fund. As above remarked, there was no certificate or policy issued to Monroe Osterman, or to his wife, evidencing her right to benefits from the widows' and orphans' fund. The conditions upon which the right to benefits from that fund depend are fully expressed in the constitution or laws of the District Grand Lodge; and, whenever such right accrues, it is the direct effect of self-executing provisions of such constitution or laws. Of course, the first condition is that, being a member of a subordinate lodge, he must have elected to become a member of the widows' and orphans' beneficial fund; and it is alleged in the complaint, and not denied, that Monroe Osterman became a member of Ophir Lodge, and a participant in the widows' and orphans' beneficiary fund, on October 19, 1881, and the answer of defendant affirmatively alleges "that, at the time said Osterman became a member of said Ophir Lodge, he also became a beneficiary or participating member of said widows' and orphans' beneficiary fund, and remained such member, except as hereinafter set forth, down to the time of his death." The only other condition is that expressed in section 15, above set out, namely, that he must have been at the time of his death "in good standing in the widow and orphan beneficiary fund." Therefore, if Monroe Osterman was a member in good standing of Ophir Lodge and of the widows' and orphans' fund at the time of his death, the plaintiff was entitled to the benefit of \$2,000. The express admission in defendant's answer that Osterman "remained such member down to the time of his death, except as hereinafter set forth," is sufficient prima facie evidence that he remained in good standing down to the time of his death, and cast upon the defendant the burden of pleading and proving that Osterman was not in good standing at the time of his death: Siebert v. Chosen Friends, 23 Mo. App. 268; Stewart v. Supreme Council, 36 Mo. App. 319; Supreme Lodge v. Johnson, 78 Ind. 110; Mills v. Rebstock, 29 Minn. 380, 13 N. W. 162; Elmer v.

Association, 64 Hun, 639, 19 N. Y. Supp. 289; Black, Ben. and Ins. Soc., sec. 454. This burden the defendant properly assumed, both in pleading and proof, and the only question for consideration is whether the evidence was sufficient to justify the jury in finding that Monroe Osterman was in good standing at the time of his death. The evidence introduced by defendant on this issue tended to prove only that Osterman was delinquent in payment of dues to Ophir Lodge amounting to \$11.50, and in payment of assessments for the endowment fund amounting to \$12.50, which were not even suspected until long after his death, and long after Ophir Lodge had certified to the Grand Lodge that he died in good standing, and nearly a month after the Grand Lodge had remitted to the trustees of Ophir Lodge the \$2,000, with direction to pay it to plaintiff. It appeared that Osterman's salary as secretary of Ophir Lodge was \$200 a year, and that a portion of it more than equal to the delinquent dues and assessments was unpaid at the time of his death; but it is claimed by appellant that the unpaid salary should have been applied to certain defalcations of the secretary, which were not discovered until after his death, and after Ophir Lodge had certified to his good standing at the time of his death, and which will be considered in connection with the plea of payment.

That the failure of a member of the widows' and orphans' beneficiary fund to pay an assessment within the time required by the laws of the society does not, ipso facto, operate to suspend him, or to affect his good standing, is apparent from the following extracts from those laws: Article 9 of the by-laws of Ophir Lodge provides: "Whenever an assessment is levied by District Grand Lodge No. 4, to pay an endowment, such assessment shall be paid by the members as provided by the general laws of this district." Section 25 of the general laws of the district provides: "A beneficiary member who fails to pay his assessments to the lodge within thirty days after the same has been levied by the secretary shall be suspended, without notice, from the benefits of the widow and orphan beneficiary fund, of which suspension the grand secretary must at once be notified. After the member becomes delinquent in two consecutive assessments, the amounts accruing therefrom, and from every subsequent assessment, shall be charged to his account as lodge dues." This implies that a member may be suspended from the widows' and orphans'

fund, and still remain a member of the subordinate lodge. A by-law of Ophir Lodge requires each member thereof to pay, as dues to that lodge, quarter yearly, \$3.50; and section 1, article 8, of the general laws of the district, applicable to subordinate lodges, provides: "It shall be the duty of the secretary to report to the lodge at the first meeting of each month the names of all those brothers who owe for dues, fines, and assessment an amount equal to the amount of dues for one year. After the secretary has reported delinquents, he shall give legal notice to those in arrears to appear, at the latest, in the second regular meeting thereafter, and show cause why they should not be suspended. If they fail to do so, the president shall put the question: 'Does any brother know a reason why Bro. ——— shall not be suspended?' If no satisfactory reason be presented to the lodge, then the president shall declare the brother suspended." This covers the whole subject of suspensions for nonpayments of assessments for the endowment fund and dues to the subordinate lodges, and shows that suspension for these delinquencies requires action by the lodge, and prescribes the mode of such action. The statement on motion for new trial contains the following admission by defendant's attorney: "Mr. Rosenthal: We admit that there never was a formal suspension of Monroe Osterman, either from membership, or from the benefits of the widows' and orphans' fund; that he never was formally suspended. No record of Ophir Lodge shows the suspension of said Osterman for nonpayment of dues or assessments, and no notice was ever issued by or from Ophir Lodge to the defendant showing nonpayment of his dues or of his suspension." It is well-settled law that, in cases of the character of this, the only competent evidence of suspension or expulsion of a member, or that a member lacked good standing in the lodge, is some authorized resolution or act of the lodge, by which such member was expelled, suspended, or degraded: *High Court etc. Order of Foresters v. Zak*, 136 Ill. 185, 29 Am. St. Rep. 318, 26 N. E. 593; *Medical & Surgical Soc. v. Weatherly*, 75 Ala. 248; *Hawkshaw v. Supreme Lodge*, 29 Fed. 773.

The learned counsel for appellant concedes that "ordinarily, under such laws as those of the defendant, which do not make the nonpayment of assessments or dues, ipso facto, operate as a suspension from benefits or membership, there must be a formal suspension before the right to benefits is forfeited."

But he contends that this case is extraordinary, in that it was the duty of Osterman, as secretary of Ophir Lodge, to report all members who were delinquent in payment of dues or assessments, and that he failed to report to the lodge his own delinquency, for which he might have been suspended. In answer to this, it is enough to say that plaintiff's right to recover is not conditioned upon the performance by her husband of his duties as an officer of the lodge, nor upon his payment of dues or assessments within the periods of time limited by the laws of the lodge, for the nonpayment of which he might have been, but was not, suspended, or otherwise deprived of his good standing. In this respect this case is materially different from that of *Hogins v. Supreme Council*, 76 Cal. 109, 9 Am. St. Rep. 173, 18 Pac. 125, cited by appellant. In that case the defendant was a fraternity organized to promote temperance, and issued policies or certificates of insurance on the lives of its members, according to the mutual benefit system, upon their applications therefor. The rules of the order required total abstinence of its members from the use of intoxicating liquors as a beverage. In his application for insurance, Hogins agreed "that a compliance with all the laws, regulations, and requirements . . . enacted by our said order is the express condition upon which I am to be entitled to participate in the mutual benefit life system." The certificate issued to him on such application declared, "This certificate is issued upon the express condition that said Daniel Hogins shall, in every particular, while a member of our said order, comply with all the laws, rules, and requirements thereof." The court found that Hogins had violated the agreement expressed in his application, and the laws of the order, by drinking whisky, brandy, and other alcoholic stimulants, as a beverage, and that his death was hastened thereby, but had never been suspended from the order, as he might have been, and gave judgment in favor of defendant. This court affirmed the judgment on the ground that the abstention of the insured from the use of intoxicating liquor as a beverage was made by the contract a condition precedent to defendant's liability to pay. But in the case at bar I think the contract will not bear the construction that payment of dues or assessments by Monroe Osterman, as required by the laws of the Grand Lodge or of Ophir Lodge, was a condition precedent to the liability of the Grand Lodge to pay plaintiff the

benefit of \$2,000. Such a construction of numerous similar contracts has been refused, as in cases above cited, and has been given in no case more nearly similar to this than that of *Hogins v. Supreme Council*, *supra*. It is claimed that to permit plaintiff to recover in this action would violate the maxim that "no one can take advantage of his own wrong." But it is not perceived that plaintiff is seeking any advantage from her own wrong. If this maxim is applicable to her case, why would it not be equally so, even if Monroe Osterman had not been secretary of Ophir Lodge, and had merely refused to pay his dues and assessments? The subtraction of his official delinquency would only reduce the degree of the wrong. Yet this maxim has never been applied to this class of cases. Besides, it cannot be assumed that Osterman would have been suspended, or otherwise degraded from his good standing, even if he had promptly reported to the lodge his alleged delinquencies; and whether he ought to have been suspended depended upon the determination of the lodge, based upon a state of facts which may have been materially different from that proved on the trial of this case. The most that should be assumed is that he might have been suspended. No effective retroactive sentence of suspension or expulsion could have been pronounced against the deceased, Osterman, in this action. Nor does the maxim that "equity regards as done that which ought to be done" apply to this case, as counsel contends. Surely, counsel would not be understood to mean that the dues and assessments of Osterman should be regarded as paid when they ought to have been paid, but only that Osterman should be regarded as having been suspended before he died, thus assuming that he ought to have been suspended; yet, as above shown, it can be assumed only that he might have been suspended in case he had not successfully defended or excused himself, and the lodge had so determined; and such a case is not within the maxim: *Pomeroy's Equity Jurisprudence*, sec. 365, and notes. Besides, this maxim does not authorize a court to assume, without evidence, that a penalty for any kind of delinquency or wrong has been inflicted by any tribunal.

2. The contention that defendant paid the benefit of \$2,000 to plaintiff is founded on the following facts and evidence: Twenty days after the death of Osterman, viz., on June 18, 1891, two members of Ophir Lodge—Messrs. Saalburg and

D'Ancona (Mr. Saalburg then being a trustee of Ophir Lodge) —called on the plaintiff, at her home, and informed her that, since the death of her husband, they had discovered that, as secretary of the lodge, he had in his hands at the time of his death a considerable sum of money, which he had received from members for dues, etc., the exact amount of which they did not then know. Mr. D'Ancona testified that he told her that the amount was \$1,000, at least. Plaintiff testified that she understood them to say it would amount to only about \$500. Omitting the further conflicting evidence as to the representations they made to her on that occasion, it appears that Mr. D'Ancona then drew, and plaintiff signed, the following instrument in writing:

"Mr. William Saalburg, Trustee Ophir Lodge, No. 21.

"You are hereby authorized to pay to Ophir Lodge, No. 21, all moneys in the hands of my late husband, Monroe Osterman, belonging to said lodge, and to deduct the same from the endowment of \$2,000 which you hold for me under the laws of District Grand Lodge No. 4.

"Mrs. MONROE OSTERMAN,
"1527 Geary Street.

"Witness: A. D'ANCONA."

At the time this instrument was executed there was no money in the hands of Mr. Saalburg, nor in the hands of the trustees of Ophir Lodge, applicable to payment of plaintiff's endowment, though application for it had been made before that time; and about three weeks thereafter it was remitted by the Grand Lodge to the trustees of Ophir Lodge, as above stated. Without regard to the conflicting evidence as to whether the facts were truly represented to plaintiff before she signed the order, and whether she understood its purport, it is sufficient to say that it is properly admitted that the order was revocable at any time before the money was paid by Saalburg to the Ophir Lodge, plaintiff being under no obligation to make good her husband's defalcations, and there being, therefore, no consideration for the order to pay them. Yet the evidence was sufficient to justify the jury in finding that she did not understand the contents or purport of the order when she signed it. A few days after the receipt of the check of defendant, and the deposit thereof in bank, by Mr. Saalburg, as hereinbefore stated, to wit, July 13, 1891, Mr. Saal-

burg, with Mr. Marcus Levy, then secretary of Ophir Lodge, again called upon plaintiff, at San Rafael, where she then resided, and procured from her the following receipt:

“San Francisco, July 13, 1891.

“Received from District Grand Lodge No. 4, Independent Order of B’nai B’rith, and of Ophir Lodge, No. 21, Independent Order of B’nai B’rith, the sum of two thousand dollars (\$2,000), in United States gold coin, in full payment of my claim against said District Grand Lodge No. 4, and said Lodge, No. 21, as the widow of the late Monroe Osterman, a member of said Ophir Lodge, No. 21, of the Independent Order of B’nai B’rith.

“_____ }
 “_____ } Trustees.
 “_____ }

SARAH OSTERMAN,
 Beneficiary.

WM. SAALBURG.

CHAS. GROSSLICHT.

L. LEVY.

“[Seal] ‘Attest: MARCUS LEVY,

“Secretary.”

As to the means used to procure this receipt and plaintiff’s understanding of the transaction the evidence is conflicting, yet sufficient to justify the jury in finding: That Messrs. Saalburg and Levy did not inform plaintiff that the Grand Lodge had transmitted the money to the trustees of Ophir Lodge, with which to pay her benefit, but represented to her that, in order to procure that money from the Grand Lodge, it was necessary that she should sign that receipt; that, to save her trouble, they would attend to the matter for her—and that she thereupon signed the receipt without reading it, believing that they would get the money and deliver it to her. That, receiving no further communication from them, and failing to receive the money, she demanded it of the Grand Lodge. That after this demand the Grand Lodge, for the first time, professed to have discovered that Monroe Osterman was not in good standing, as a member of the widows and orphans’ department, at the time of his death, and for that reason refused payment, and ordered the trustees of Ophir Lodge to return the money which it had transmitted to them as above stated. There is no evidence that Mr. Saalburg or the trustees of Ophir Lodge ever paid any part of the money to Ophir Lodge. On the contrary, Mr. Saalburg testified that, on the

expiration of his term of office as trustee, the money was still in bank, where he first deposited it; that he delivered the evidence of the deposit to his successor in office, and, for aught he knew, the deposit had not been withdrawn or changed at the time of the trial. Nor is there any evidence as to whether Ophir Lodge returned the money to the Grand Lodge in obedience to the order of the latter lodge, nor any evidence that Ophir Lodge ever claimed the money, or denied the right of defendant to demand a return thereof. If the money has not been returned, it is in the hands of defendant's agents, and therefore legally in its possession. The check for the money was sent to the secretary of Ophir Lodge, with instruction that it be paid to plaintiff "through the trustees" of that lodge. Surely, this constituted those trustees agents of defendant for that special service. It follows that the jury was fully justified in finding for the plaintiff, against the plea of payment, notwithstanding her receipt.

3. It is contended for appellant that "the court erred in charging the jury that the burden of proving the charge that the plaintiff consented that the money due upon the endowment should be applied toward the payment of the sum embezzled by Osterman was upon the defendant." This charge that plaintiff consented, etc., is a material part of affirmative new matter pleaded by defendant as a defense. The other part of the plea is that, pursuant to such consent, the money was actually applied to the payment of the sum embezzled. Of the issues thus tendered, the defendant undoubtedly held the affirmative, and, as to them, would have been defeated if no evidence had been given on either side. Therefore, as to each of those issues, the burden of proof was on the defendant (Code Civ. Proc., sec. 1891), and the court did not err in so instructing the jury.

4. The court charged the jury, in substance, that, unless they found that Osterman had been suspended by some act of the lodge, his indebtedness to the lodge for dues, assessments or money received by him, and not accounted for, constitutes no defense to the action. That this instruction was not erroneous is apparent from the foregoing considerations and authorities cited.

5. There is nothing worthy of serious additional consideration in the point that "the action has not been brought against the proper party," but that it should have been

brought against Saalburg, or Ophir Lodge, if at all. To answer this point requires only a repetition of foregoing discussion as to the liability of the defendant, it being there shown that there is no evidence that Ophir Lodge ever received, or even claimed, the money; but it is proved that the trustees of Ophir Lodge received the money as mere agents of defendant, with direction to pay it to plaintiff, and that defendant afterward ordered them to return to it, etc. It is stated and reiterated by counsel for appellant that the District Grand Lodge alone is responsible for the payment of endowments, and that subordinate lodges have no control over the endowment department of the Grand Lodge. The action of Saalburg in his endeavor to divert the money from the plaintiff to Ophir Lodge was wholly unauthorized by either the Grand Lodge or Ophir Lodge; and it effected nothing which could make him responsible to plaintiff for the payment of the money. I think the judgment and order should be affirmed.

We concur: Haynes, C.; Britt, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

BROKER v. TAYLOR.

No. 19,429; January 24, 1896.

43 Pac. 387.

Appeal—Judgment-roll.—Where an Appeal from an order denying a new trial is dismissed for want of an undertaking, only such questions can be considered as arise upon the judgment-roll.

APPEAL from Superior Court, San Bernardino County; John L. Campbell, Judge.

Action by Henry Broker against John Taylor, administrator, etc. Plaintiff had judgment and defendant appeals. Affirmed.

Paris & Allison for appellant; Bledsoe & Hutchins and Rolfe & Rolfe for respondent.

PER CURIAM.—Defendant appealed from the judgment and an order denying a new trial. The appeal from the order was, on motion of respondent, dismissed, for want of an undertaking to support it. The questions subject to our review, therefore, are such only as arise upon the judgment-roll. No such questions are presented in appellant's briefs, the points there discussed being such alone as would arise on an appeal from the order denying a new trial. We have examined the record, and are satisfied that the complaint states a cause of action, and that the findings are sufficient to support the judgment in favor of plaintiff. The suggestion made at the oral argument that the judgment should not have been against Papenhausen, as executor, is, we think, without substantial merit. The court found that he had the fund in his hands as executor; and the judgment was, in effect, that it be paid over to plaintiff in due course of administration. Technically, perhaps, the theory upon which the plaintiff recovered was that the property did not belong to the estate; but, being in defendant's hands, we cannot see wherein his rights are in any way prejudiced by the form of the judgment, and the objection may therefore be disregarded. The judgment appealed from is affirmed.

RUNK v. SAN DIEGO FLUME CO. et al.

L. A. No. 4; January 29, 1896.

43 Pac. 518.

Malicious Prosecution.—A Complaint Against a Flume Company alleging incorporation of defendant; that defendant maliciously had plaintiff arrested and imprisoned, necessitating bail, and tried, on a charge of interfering with its flume meters without authority; that he was tried and duly acquitted; that by these acts he was injured in reputation, and suffered great anxiety, to his damage in a certain sum—sufficiently states a cause of action for malicious prosecution.

APPEAL from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by J. B. Runk against the San Diego Flume Company and others for malicious prosecution. From a judgment for defendants, plaintiff appeals. Reversed.

Aitken & Smith for appellant; McDonald & McDonald and Works & Works for respondents.

VANCLIEF, C.—Action to recover damages for an alleged malicious prosecution. A demurrer to the complaint on the grounds that it does not state a cause of action, that in specified particulars it is uncertain, and that two causes of action are improperly joined therein, was sustained by the trial court; and thereupon, plaintiff declining to amend his complaint, judgment passed for defendants. Plaintiff appeals from the judgment, and contends that the court erred in sustaining the demurrer. The following is a copy of the complaint: “(1) That on the nineteenth day of July, A. D. 1894, the said defendants, contriving and maliciously intending to injure the said plaintiff in his good name and reputation, and to cause him to be imprisoned, falsely and maliciously, and without any reasonable or probable cause therefor, procured and caused plaintiff to be charged before E. J. Ensign, a justice of the peace of San Diego township, county of San Diego, state of California, with the crime of: ‘Without authority from the San Diego Flume Company (a corporation), of said county, or any agent thereof, did raise, disturb and open an appurtenance attached to a flume belonging to said San Diego Flume Company, then and there used for the purpose of holding and conveying water for agricultural and domestic uses, and which said appurtenance was so attached to said flume or conduit for the purpose of measuring and controlling water held and conveyed in and by said flume or conduit, and used for said purposes,’ and thereupon caused said justice to make out a warrant, in due form of law under his hand, for the apprehension of plaintiff, and falsely and maliciously, and without probable cause therefor, caused plaintiff to be arrested on said charge, and to be imprisoned for two hours, and compelled to give bail in the sum of one hundred dollars (\$100) for his release. (2) That on the thirty-first day of July, 1894, at the trial of said cause, the plaintiff was acquitted of said crime, and said prosecution is wholly ended and determined. (3) That by means of which said acts the plaintiff has been greatly injured in his credit and reputation, and brought into public scandal, infamy and disgrace, and has suffered great anxiety and pain of body and mind, to his damage in the sum of

five thousand dollars, and has been forced to lay out and expend the sum of one hundred dollars in procuring his discharge from said imprisonment, and in defending himself. (4) That the defendant San Diego Flume Company is a corporation duly organized under and by virtue of the laws of the state of California, and has its principal place of business at San Diego, California. Wherefore plaintiff demands judgment against said defendants for the sum of five thousand one hundred dollars (\$5,100), and all costs of suit." The cause was submitted to this court by written stipulation, "upon the briefs of the respective parties now [then] on file." But there is no brief on file on the part of respondents; and, without aid from counsel for respondents, I have been unable to perceive that the complaint is open to attack upon any ground specified in the demurrer. It seems to state a single cause of action, conformably to the precedents, and with sufficient certainty: 2 Chit. Pl. 555; Work, Prac. & Pl. 211, 212; 1 Boone, Code Pl., sec. 167; 2 Boone, Code Pl., p. 272; Bates, Pl., 550; 2 Greenl. Ev., sec. 449; Townsh. Sland. & L., sec. 420 et seq.; Druex v. Domec, 18 Cal. 83; Eastin v. Bank of Stockton, 66 Cal. 123, 56 Am. Rep. 77, 4 Pac. 1106; Krause v. Spiegel, 94 Cal. 370, 28 Am. St. Rep. 137, 15 L. R. A. 707, 29 Pac. 707. See, also, Pen. Code, sec. 624, under which the alleged prosecution of plaintiff in the justice's court was probably intended. I think the judgment should be reversed and the cause remanded, with direction that the court below overrule the demurrer.

We concur: Belcher, C.; Searls, C.

PER CURIAM.—For the reasons stated in the foregoing opinion the judgment is reversed and the court below is instructed to overrule the demurrer.

SMITH et al. v. SABIN.*

No. 16,014; January 30, 1896.

43 Pac. 588.

Appeal.—Where There is a Conflict in the Evidence, the finding of the trial court will not be disturbed.

APPEAL from Superior Court, City and County of San Francisco; A. A. Sanderson, Judge.

Action by William F. Smith and others against John I. Sabin. There was a judgment for defendant and plaintiffs appeal. Affirmed.

A. Heynemann for appellants; Stanley, Hayes, McEnerney & Bradley for respondent.

BELCHER, C.—The plaintiffs were architects, doing business as partners under the firm name of Smith & Freeman. They brought this action in July, 1893, to recover the balance alleged to be due them for services performed at the request of the defendant, in 1891, in drawing plans and specifications, and procuring bids thereon, for a hotel, to be called "Hotel Edison," and to be situated at the corner of Sutter and Hyde streets, in the city of San Francisco, but which was never constructed. It is alleged that the hotel was to cost about the sum of \$134,000, and that the reasonable value of plaintiffs' services was \$3,350, of which sum \$1,000 had been paid, leaving still due \$2,350, for which judgment was asked. The answer of defendant denied that the proposed hotel was to cost about the sum of \$134,000, and alleged that the plans and specifications prepared by plaintiffs were made under the express agreement that they should not require the expenditure of, and the hotel should not cost, any greater sum than \$100,000; that all of the services performed by plaintiffs were performed under that special contract, and that the plans and specifications made and furnished by plaintiffs required the expenditure of \$134,775, and that no other plans or specifications had ever been prepared by plaintiffs for defendant for the erection of said or any hotel. The case was

*Rehearing denied.

tried by the court without a jury, and the findings were that the Hotel Edison was not to cost about the sum of \$134,000, but, on the contrary, before the performance of any services by plaintiffs for defendant, it was understood and agreed between them that the plans and specifications to be prepared should not require the expenditure of more than about \$100,000; that the plans and specifications made by plaintiffs were made under the express agreement that the hotel should not, under said plans and specifications, cost any greater sum than about \$100,000; that the only plans and specifications made and furnished by plaintiffs required the expenditure by defendant of the sum of \$134,775; that while the plaintiffs were engaged in drawing said plans and specifications, and while their contract to draw the same was unfinished and unperformed, the defendant, at the request of the plaintiffs, paid on account thereof the sum of \$1,000; and that upon the trial of this case the return of said sum of \$1,000 was waived by defendant; and, as a conclusion of law, it was found that the defendant was entitled to judgment against the plaintiffs for his costs. Judgment was accordingly entered that the plaintiffs take nothing by the action, from which, and from an order denying their motion for a new trial, they have appealed.

In support of the appeal it is earnestly urged—and this is the only point made—that the findings were not justified by the evidence, and hence that the judgment should be reversed. This position cannot be sustained. After carefully going over the record, we are satisfied that there was evidence tending to support the theory of the defense, and to justify the findings. This being so, the case comes within the well-settled rule of this court that where there is a conflict of evidence the findings of the trial court will not be disturbed on appeal. It would subserve no useful purpose to detail the evidence introduced by the respective parties, and it is therefore passed without more particular notice. The judgment and order appealed from should be affirmed.

We concur: Britt, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

JOHNSON v. THOMAS.

L. A. No. 63; January 31, 1896.

43 Pac. 578.

Negligence—Fast Driving—Contributory Negligence.—Plaintiff was run over at a street crossing by a wagon driven at great speed by defendant's servant. Plaintiff saw the wagon when it was about a block away, but, thinking that it would not be turned toward the side street where he was standing, because of the high speed, paid no further attention. Held, that the question of contributory negligence was properly left to the jury.

Negligence—Fast Driving—Speed Ordinance.—In an action for injuries due to fast driving, a city ordinance prohibiting fast driving is admissible to show negligence.

APPEAL from Superior Court, Los Angeles County; Walter Van Dyke, Judge.

Action by Peter Johnson against Albert Thomas for personal injuries due to negligence of defendant's servant. From a judgment for plaintiff and an order denying a new trial defendant appeals. Affirmed.

H. D. Cassidy for appellant; Variel & Davis for respondent.

SEARLS, C.—This is an action by Peter Johnson to recover damages for personal injuries received by plaintiff by being knocked down and run over by a horse and wagon driven by a servant of defendant, upon a public street in the city of Los Angeles, California. Plaintiff had a verdict and judgment for \$500, from which judgment, and from an order denying his motion for a new trial, defendant appeals. Appellant makes three points for reversal: (1) That the court below erred in denying defendant's motion for a nonsuit. (2) That the court erred in admitting in evidence, on the part of plaintiff, section 4 of Ordinance 202 of the city of Los Angeles. (3) That the verdict of the jury is not sustained by the evidence.

The evidence on the part of the plaintiff, among other things, tends to show that Macy street, in the city of Los

Angeles, runs east and west, is, say, fifty-seven feet wide, and is crossed at right angles by Alameda street, which is ninety-six feet wide, with a sidewalk on the west side thereof twelve feet wide, and two railroad tracks running longitudinally through it, at or near the center thereof. Macy street, going east thereon, has, at the point in question, a downgrade of, say, seven and three-fourths feet in a distance of one hundred and seventy-five feet. Plaintiff is a cabinet-maker and carpenter, and has a shop on the west side of Alameda street one hundred and fifty feet south of its intersection with Macy street. On the fifteenth day of January, 1894, plaintiff started to go from Kerchkoff & Cuzner's mill, on Macy street, to his shop, on Alameda street. He had his apron full of blocks, brackets, etc., which he held with his right hand, and in his left hand he carried some larger articles of like character. His course took him west along the south side of Macy street, to and across Alameda street, thence south, on the west side of the latter street, to his shop. When crossing Alameda street, the horse and heavy spring wagon of defendant, driven rapidly by Albert Jennings, the servant of defendant, came east down Macy street, turned south into Alameda street, and struck plaintiff, who was upon the crossing, and within eight to ten feet of the sidewalk, on the west side of Alameda street, knocking him down, and two wheels of the wagon passing over him, whereby he was seriously injured, etc. Plaintiff first saw the horse and wagon of defendant a block away (one hundred and seventy-five feet) coming down Macy street, when he was near the center of Alameda street, and, as he testified, coming down Macy street "at terrific speed," and supposed from the rapidity with which the horse was being driven he would continue on straight down Macy street, and did not further observe the team or look for it until at or about the moment he was struck down. To the question asked plaintiff, on cross-examination, "Well, at the time when you saw him coming rapidly, didn't it excite your fear of danger at all?" He answered, "No, sir; it didn't. I supposed by the way he was coming that he was going on right down Macy street." Again, he said, in answer to what reason he had for thinking he would continue down Macy street, "He was going so fast. It is kind of a sharp turn there for a man down Macy; and, as

I said, I paid no attention." There was other testimony tending to show that defendant's horse was driven down the grade at "about a four-minute gait," and that there were no obstructions to a clear view. There was also evidence tending to show that defendant's horse was restive and nervous; had been frightened by a passing freight train, and as a consequence was not fully under control of his driver when he came down Macy street, but that he was stopped within "ten or fifteen feet" after the accident. That the horse came down Macy street at a speed so great as to attract the attention and excite the interest, if not fears, of witnesses, is apparent from the testimony. Allen J. Cobb says: "I saw a wagon coming very rapidly down Macy street. I watched it to see which way it was going, as it was coming so fast I thought I might have to dodge." Plaintiff introduced in evidence section 4 of Ordinance No. 202 of the city of Los Angeles, which is as follows: "It shall be unlawful for any person to immoderately ride or drive any horse upon any public street of the city of Los Angeles, or to permit any horse or horses attached to any vehicle to gallop, run or race upon any public street of said city."

Upon the showing made by plaintiff, the motion for a nonsuit was properly denied. Treated as a question of contributory negligence on the part of plaintiff, which proximately led to the result, the evidence falls short of a case in which the court is authorized, as matter of law, to say the plaintiff was inhibited from a recovery. As a general proposition, cases of negligence (to which those of contributory negligence form no exception) present a mixed question of law and fact, in which it devolves upon the court to say, as matter of law, what is or amounts to negligence, and upon the jury to determine, as matter of fact, whether or not, in the particular case, the facts in proof warrant the imputation of negligence. Where, however, the facts are undisputed, and the inference of negligence is irresistible, and not open to doubt, debate, or rational difference of opinion, the question becomes one of law, to be passed upon by the court: *Dufour v. Railroad Co.*, 67 Cal. 319, 7 Pac. 769; *Long v. Railroad Co.*, 96 Cal. 269, 31 Pac. 170; *Jamison v. Railroad Co.*, 55 Cal. 593; *Van Praag v. Gale*, 107 Cal. 438, 40 Pac. 555; *Davis v. Button*, 78 Cal. 248, 18 Pac. 133, and 20 Pac. 545; *Holmes v. Railroad Co.*, 97 Cal. 161, 31 Pac. 834; *Wardlaw v. Railway Co. (Cal.)*,

ante, p. 225, 42 Pac. 1075. As was said in *Van Praag v. Gale*, 107 Cal. 438, 40 Pac. 555, "it by no means follows that the facts are admitted because there is no conflict in the testimony. . . . What the plaintiff did is established without dispute and beyond cavil; but whether from this conduct the deduction is inevitable that he did not exercise the precautions for his own safety which a reasonable man would have done under precisely the same circumstances is not so clear. That this is the ultimate fact to be determined must be conceded." When plaintiff saw the servant of defendant coming down the street, driving like "Jehu, the son of Nimshi," he reasoned that he would continue down Macy street, and not make the short turn at such a rate of speed onto Alameda street. This conclusion was very likely one warranted by observation in like cases, and the inference of negligence on the part of plaintiff in not further watching the team depended upon whether or not he was justified in this reasoning. It was certainly an inference upon which minds might well differ, and hence proper to be submitted to a jury, under proper instructions. There is nothing in the testimony to show that plaintiff could have reasonably escaped injury by any amount of care, after the horse and wagon turned upon Alameda street, and to hold that a foot passenger in crossing a side street must watch and plan to escape injury from vehicles upon a main street without some indication that the latter are about to leave such main street, and that a failure so to do is conclusive evidence of negligence, is to carry the doctrine of contributory negligence to a romantic and unwarranted length. The evidence of negligence on the part of defendant's servant was ample, and the motion for a nonsuit was properly denied.

2. The section of the city ordinance was properly admitted in evidence. "The violation of any statutory or valid municipal regulation, established for the purpose of protecting persons or property from injury, is of itself sufficient to prove such a breach of duty as will sustain a private action for negligence, if the other elements of actionable negligence concur. Thus, the violation of a statute or ordinance regulating the speed of vehicles, horses or trains . . . is such a breach of duty as may be made the foundation of an action by any person belonging to the class intended to be protected by such a regulation, provided he is specially injured

thereby": Shear. & R. Neg., 4th ed., sec. 13, and cases there cited.

3. The evidence was sufficient to uphold the verdict. To discuss it at length can be productive of no good. Many of the incidents testified to by Jennings, the driver of the horse, were sharply contradicted, and in such a case the action of the jury thereon is conclusive. The judgment and order appealed from should be affirmed.

We concur: Haynes, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

SANTA CRUZ ROCK PAVING COMPANY v. LYONS
et al.*

No. 15,760; January 31, 1896.

43 Pac. 599.

Lien for Street Work.—Evidence That a Husband Signed a Contract for street work in front of a lot the record title to which was in the wife, and stated to the contractors that the lot was community property, will sustain a finding that he was the "reputed owner," within Code of Civil Procedure, section 1191, as amended, providing that any person performing work on a street in front of a lot at the request of the "reputed owner" shall have a lien on the lot for work and materials.

Married Woman—Separate Property.—The Presumption that property conveyed to a married woman becomes her separate estate is not conclusive.¹

*For subsequent opinion in bank, see 117 Cal. 212, 59 Am. St. Rep. 174, 48 Pac. 1097.

¹ Cited in Santa Cruz Rock Paving Co. v. Lyons, 133 Cal. 115, 118, 65 Pac. 330, 331, as part of the history of the case.

Cited and approved in Killian v. Killian, 10 Cal. App. 318, 101 Pac. 808, where it is said that as the community may be vested in either spouse, and its true character determined from the nature of the transaction, without reference as to who retains the title, evidence is admissible tending to establish any facts that may overcome the presumption.

APPEAL from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by the Santa Cruz Rock Pavement Company against Ellen Lyons and another to foreclose a lien for street work. Judgment for plaintiff and defendants appeal. Affirmed.

Allen, McAllister & Frohman and John B. Carson for appellants; Parker & Eells for respondent.

BELCHER, C.—This action was brought to recover the sum of \$482.88, alleged to be due from defendants to plaintiff for setting granite curbs, and grading and paving the street, in front of a certain lot in the city of San Francisco, and to foreclose a lien on the lot for the said sum, together with the cost of verifying and filing the claim of lien and a reasonable attorney's fee. The defendants, James M. and Ellen Lyons, were husband and wife, and had been such for about twenty-one years. It is alleged in the complaint that the defendant Ellen Lyons was at all the times mentioned therein the owner of record of the said lot, and that the same was and is community property; that her husband was the reputed owner of it, and that he requested the plaintiff to do the work while he was such reputed owner; that he entered into a written contract with plaintiff for its performance, "both in his own individual behalf and as the agent of his wife, Ellen, and in her behalf, though in his own name"; that he individually, and on behalf of his wife, promised to pay plaintiff for the work done; and that she "had full knowledge of said contract and of the performance of said work prior to and during the performance of said work, and that she did not within three days after having obtained knowledge thereof, nor at all, give notice that she would not be responsible for the same, by posting a notice in writing to that effect, in some conspicuous place upon said land, nor upon any land, nor at all"; that the plaintiff duly performed all the terms and conditions of its contract, and that the work was completed on August 1, 1892, and was duly accepted by the superintendent of streets; that the amount due plaintiff under the contract was \$482.88, no part of which had been paid; and that it filed its claim of lien on August 26, 1892. The defendants answered separately. The answer of Mrs. Lyons denied that the lot in question was the community property

of herself and husband; denied that her husband was ever the reputed owner of the lot; denied that he, as her agent, ever requested the plaintiff to do the work for which it seeks to recover, or ever promised to pay plaintiff for said work, or ever entered into any written contract with plaintiff for the performance of said work, or any work; denied that at any time mentioned in the complaint she had full or any knowledge of the contract mentioned therein, or that she ever agreed to the same; and alleged that she never at any time entered into any contract with the plaintiff for the performance of any street work, or authorized her husband, as her agent, to enter into any such contract; that he has never had any interest in the property affected; and that she at all the times mentioned in the complaint was the sole and separate owner thereof. The answer of Mr. Lyons denied that the said lot is or ever was community property; that he was ever the reputed owner of it, or had any separate interest in or claim upon it; that he ever entered into any contract with the plaintiff, as the agent of his wife, to improve the street in front of the property, or ever promised on her behalf to pay any sum of money for any street work or improvements in front of it; and alleged that he was never authorized by her to enter into any contract with plaintiff for the performance of any street work in front of said lot. Upon the issues thus raised, the case was tried, and the court found, among other things, that, at all the times mentioned in the complaint, the "defendant Ellen Lyons was, and she now is, the owner of the lot of land described in said complaint as her separate property, but at all said times said James M. Lyons, individually, was the reputed owner thereof; that, while said James M. Lyons was so the reputed owner of said lot of land, he requested said plaintiff to do the work hereinafter named, and he, both in his own individual behalf and as the ostensible agent of his wife, Ellen, and in her behalf, though in his own name, entered into a written contract with the plaintiff for the performance of the same, and thereupon, at the request of said defendant James M. Lyons, said plaintiff improved the street in front of and adjoining said lot of land, and, in so doing, did the work and furnished the materials hereinafter mentioned." And, as conclusions of law, the court found that the plaintiff was entitled to recover from the defendant James M. Lyons, individually, the sum of

\$482.88, with interest thereon from August 26, 1892, and the cost of verifying and filing its claim of lien, its costs of suit, and an attorney's fee fixed at \$50, the whole aggregating \$611.22; and that it had a lien on said lot for the said amount. Judgment against Mr. Lyons, and a decree foreclosing the lien, and directing a sale of the lot, were accordingly entered, from which decree, and an order denying their motion for a new trial, defendants appeal.

It is not claimed that the work for which plaintiff seeks to recover was not well and properly done, or that the amount allowed therefor was not justly due from Mr. Lyons, but it is contended that there was no legal obligation resting upon Mrs. Lyons to pay for the work, and hence that the court erred in determining that the amount allowed was a lien on her lot; and, in support of this position, the finding that Mr. Lyons was the reputed owner of the lot, and, as such, requested the plaintiff to do the work, and entered into the contract therefor, is assailed as not justified by the evidence. The lot in question is eighty-seven feet wide, and is situated on the easterly side of Lyon street, between Post and Sutter streets, in San Francisco; and the contract relied on was to set granite curbs (where necessary), and to pave with bituminous rock Lyon street between the other two streets named. The contract was dated June 29, 1892, and purported to be executed by all the lot owners on both sides of the street to be paved, "whose names are hereunto subscribed, with the number of feet frontage of lots represented and owned by each, respectively, set opposite their respective names, each contracting severally," and each for himself, and not one for the others, promising to pay "for the work done in front of his or her own property, respectively," at certain stipulated rates. At the time the contract was signed, a contract to do the work was about to be let under an order of the board of supervisors. The plaintiff corporation desired to obtain a private contract for the work, and to that end sent two of its solicitors (Mr. Robertson and Mr. Gould) to interview the lot owners. The solicitors went out to the block, and met several of the lot owners, and talked the matter over with them. They were all invited into the house of one of the owners, and others were then sent for, and came in. Among others present was Mr. Lyons. The matter was talked over for a considerable time, and Mr. Lyons said he wanted basalt

blocks put down. Mr. Gould told him that the order of the board of supervisors required bitumen. After further talk, according to the testimony of both Robertson and Gould, Mr. Lyons said he could not sign a contract that night. Mr. Gould asked him why, and he said, "I have got somebody else to see." Mr. Gould asked, "Who is it?" and he said, "My wife." Mr. Gould then asked if it was community property, and he said it was, and that he and his wife owned it together. It was then agreed that the parties would meet again the next evening, at the same place. At the meeting on the next evening, Mr. Lyons signed the contract, his name being the fourth in the list of thirteen, and, as he was doing so, Mr. Gould again asked him, "Do you own the property, or does your wife own it?" and he said, "We both own it." Mr. Gould then said, "All right; then you sign your name there." The work was commenced two or three days after the contract was signed, and was completed and approved by the superintendent of streets, and the lien filed, as alleged in the complaint. Mrs. Lyons testified that she purchased the lot about two years after her marriage to Mr. Lyons, and paid for it with money derived from the estate of her first husband, and money raised on mortgages, and that she never authorized her husband to sign the contract, and he never told her he had signed it until after the bill was presented; that she "was under the impression that these people were obtaining it from the city." Mr. Lyons testified that he did not own any real estate or other property, and that he was a carpenter, and used the money he earned to raise his family; and, when asked if he did not put his money into paying off mortgages on this property, he answered that he could not tell where it went; that, when he made a few dollars, he gave it to his wife. He also testified that his wife never authorized him to sign the contract; that he signed it of his own will, with the understanding that he would have time to pay for it; that he thought, according to the agreement, that he would have time to make the payment, and he assumed it as a personal affair; and that he never stated to Mr. Gould or Mr. Robertson that the property was community property, or that he had somebody else to see before he could sign the contract. He further said: "I never mentioned at home that I had signed the contract until after the work was going on. It was after everybody could see that it was started. On

Thursday evening the contract was signed, and on Saturday morning the work was started. I told her that I would have to pay for it; that is all. Q. By the Court: When did you tell her that? A. After the work was started. Q. How long after that? A. Well, probably the next day or two. Q. You told her you had signed the contract? A. Yes, sir; I told her then."

In 1885, section 1191 of the Code of Civil Procedure was amended so as to read as follows: "Any person who, at the request of the owner of any lot in any incorporated city or town, grades, fills in, or otherwise improves the same, or the street or sidewalk in front of or adjoining the same, has a lien upon such lot for the work done and materials furnished." And in the same year a general law to provide for work upon streets within municipalities was passed (Stats. 1885, p. 147), by which, in section 16, the word "owner" was declared to be (for the purpose of this law) "the person owning the fee, or the person in whom, on the day the action is commenced, appears the legal title to the lots and lands, by deeds duly recorded in the county recorder's office of each county, or the person in possession of lands, lots, or portions of lots or buildings under claim, or exercising acts of ownership over the same for himself," etc. In 1887, section 1191, *supra*, was again amended by prefixing to the word "owner" the word "reputed," so that it has since read: "Any person who, at the request of the reputed owner of any lot," etc.

The question then is, What is meant by the words "reputed owner," as used in the code? Counsel for appellants argue that there is no material difference in the meaning of these words and that of the word "owner," as used in the statute; and they say that "the legislature therefore could not have contemplated anything else by the expression 'reputed owner' than cases where a person contracts for street work who has the apparent title to property by deeds of record, or who has the apparent possession by reason of exercising acts of ownership over the property for himself." And hence it is insisted that, as shown by the evidence, Lyons was not, and could not have been, the reputed owner of the lot in question. But, if this theory be true, then it is evident that nothing was accomplished by the amendment, and it might as well not have been made. The Century Dictionary

defines the words "reputed owner" as "a person who has to all appearances the title to and possession of property." Anderson's Law Dictionary defines the same words as "one who, from all appearance, or from supposition, is the owner of a thing; as of property subject to taxation or to assessment for a municipal improvement." And Burrill's Law Dictionary defines the word "reputed" as "considered; generally supposed." And it is added: "This word has a much weaker sense than its derivation would appear to warrant; importing merely a supposition or opinion derived or made up from outward appearances, and often unsupported by fact. The term 'reputed owner' is frequently employed in this sense: 2 Steph. Comm. 206." Prior to 1889 all property acquired after marriage by either husband or wife was presumed to be community property; but in that year section 164 of the Civil Code was amended by adding the provision that, "whenever property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property." These presumptions are, however, only rules of evidence, which can be met and overcome by proofs, except where a right to property is involved which became vested in a third party before the amendment, in which case the presumption is said to be a rule of property as well as of evidence: *Jackson v. Torrence*, 83 Cal. 529, 23 Pac. 695; *Jordan v. Fay*, 98 Cal. 264, 33 Pac. 95.

Here it appears, as before stated, that the lot was acquired by Mrs. Lyons after her marriage, and hence the fact that she had the record title was not at all conclusive. It might, nevertheless, have been considered or supposed to be community property. And when Mr. Lyons signed the contract as the owner of it, and stated, as the court below must have believed he did, that it was community property, and was owned by himself and wife together, it would naturally be supposed that he was such owner. We conclude, therefore, that the court was justified by the evidence in finding that, for all the purposes of this case, he was the reputed owner of the lot.

Other questions are very elaborately discussed by counsel, but, in view of the conclusion reached on the first point, they need not be considered. We find no material error in the

rulings of the court, and advise that the decree and order appealed from be affirmed.

We concur: Searls, C.; Vandelief, C.

PER CURIAM.—For the reasons given in the foregoing opinion the decree and order appealed from are affirmed.

WITTER v. McCARTHY CO.

L. A. No. 67; February 2, 1896.

43 Pac. 969.

Trusts—Ratification by Beneficiaries.—In an Action to Quiet Title to an undivided interest in land, it appeared that defendant's grantor, as owner of a tract of land, after contracting to convey undivided interests in it to several persons, of whom plaintiff was one, and receiving part of the purchase price, by agreement with them dated March 1, 1888, conveyed the land to a trustee, a party to the agreement, with plenary power to sell and convey; that this agreement required the trustee to distribute the proceeds among the respective grantees in proportion to the interests held by each, deducting from the share of each the amount due from him on the purchase price, and pay the same to the grantor, less the amount of a mortgage which he had agreed to pay; that the trustee never sold the land, but, November 1, 1892, conveyed to each of the beneficiaries his undivided interest; that an interest of twenty-five fortieths was conveyed to the grantor, who recorded the deed thereof; that the grantor subsequently acquired an eight-fortieths interest conveyed to others by the trustee at the same time, and January 30, 1893, conveyed his entire interest (thirty-three fortieths) to defendant. There was no evidence that any of the parties to the agreement objected to the conveyances by the trustee, or that defendant did till filing its answer in this action, November 12, 1894. Held, that a finding that all the beneficiaries to the trust consented to and acquiesced in the conveyances by the trustee was warranted.

A Corporation is Charged With the Knowledge of Its President, acting as attorney in fact of one making an assignment to it.

APPEAL from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by W. E. Witter against the McCarthy Company to quiet title. From a judgment for plaintiff and an order denying a new trial defendant appeals. Affirmed.

McKeeby & Appel for appellant; Wicks & McDonald for respondent.

VANCLIEF, C.—Action to quiet the alleged title of plaintiff to an undivided two-fortieths part of a tract of land containing about one hundred and thirty acres, situate in the county of Los Angeles. The defendant, for want of information or belief, denied plaintiff's alleged title, and asserted title adverse to that claimed by plaintiff. The court below, without the intervention of a jury, found the facts and law in favor of plaintiff, and rendered its judgment accordingly. The defendant appeals from the judgment, and from an order denying its motion for a new trial.

The facts relative to the question of title are substantially as follows: Prior to March 1, 1888, Edward McCarthy was sole owner of said tract of land, subject to a mortgage for \$15,000, but prior to that day had contracted to sell to each of a number of persons undivided portions thereof, and had received from them portions of the purchase money. The plaintiff was one of such contractors, to whom, on February 15, 1888, Edward McCarthy had contracted to sell two-fortieths of said tract for the price of \$6,000, of which \$1,500 was paid at the date of the contract, and the remainder was to be paid, \$1,125 in three months, \$1,125 in six months, \$1,125 in nine months, and \$1,125 in twelve months, from date of the contract. All parties interested desiring that the whole tract of one hundred and thirty acres be subdivided and sold in lots to suit purchasers, and that the proceeds in money be distributed in proportion to the undivided interests of the parties, it was agreed that Edward McCarthy should convey the whole tract to J. I. Weed in trust to make such sales and conveyances and to distribute the proceeds thereof according to the agreement. This agreement was reduced to writing and executed by the three parties thereto, on March 1, 1888, to wit, Edward McCarthy, of the first part; W. E. Witter, G. P. Lyman, L. A. Thompson and eight others (contractors for undivided interests), of the second part; and J. I. Weed, of the third part. The agreement confers upon the trustee plenary power "to grant, bargain, sell and convey all or any portion of said land for such price and upon such terms as he shall deem best," and, as to his duties, contains the following: "It is further agreed that the trustee aforesaid shall re-

ceive and collect all moneys for sales of the land aforesaid, and pay all taxes, commissions, expenses of sale, of all kinds, and improvements authorized by the parties of the second part, and shall on or before the first day of July, A. D. 1888, declare a dividend in favor of the second parties of any and all moneys in his hands, in proportion to the interests of the respective parties therein, as shown by the contracts with Edward McCarthy aforesaid, and shall, out of said dividends, pay to Edward McCarthy the amounts due or to become due to him from second parties on said contracts, and the balance, if any there be, to the respective parties entitled thereto; and, in case the dividend shall not equal the installment due on said contract, second parties shall pay the balance of said installments at the times provided therein, and said trustee shall declare dividends, and apply the proceeds in the same manner every three months thereafter until all the installments on said contracts have been paid, and all of said property shall have been disposed of. It is further understood and agreed that whereas there is now a mortgage on said property to the amount of \$15,000, with interest at ten per cent from March 1, 1888, of which Edward McCarthy has assumed the payment, that in case it becomes necessary or expedient to change or renew said mortgage the trustee shall, and he is thereby authorized to, execute such mortgage in his own name, and the amounts received by said trustee from said second parties, or in their behalf applicable to the installments due to Edward McCarthy, shall be applied to the liquidation of said mortgage, and shall be credited on the contracts of Edward McCarthy to second parties in the proportions to which they are respectively entitled thereto. It is further understood and agreed that in case of the failure or refusal of second parties, or any of them, to make the payments to Edward McCarthy provided for in said contracts, so as to thereby forfeit their rights to the interest in said land as provided in said contracts, the said trustee shall pay to Edward McCarthy all the proceeds of the sales of said lands to which the holder of said contract would otherwise be entitled to receive, and second parties agree to hold said trustee harmless in carrying out this provision." Contemporaneously with the execution of this tripartite agreement, Edward McCarthy conveyed the legal title of said tract of land to J. I. Weed by deed absolute upon its face, the trust being expressed only in said agree-

ment. Weed never sold any part of said tract of land as contemplated by the trust agreement, but on November 1, 1892, four years and eight months after having accepted the trust, he conveyed to each of the beneficiaries an undivided part thereof equal to his beneficial interest in the whole. To plaintiff he thus conveyed two-fortieths, that being the interest which plaintiff had contracted to purchase from Edward McCarthy as aforesaid, and for which he had fully paid according to the terms of his said contract with Edward McCarthy, and had also settled his proportion of the expenses of the trust to the satisfaction of the trustee. To Edward McCarthy the trustee conveyed on the same day (November 1, 1892) twenty-five fortieths of the land. Afterward Edward McCarthy acquired from other parties to the tripartite agreement eight-fortieths which had been conveyed to them by the trustee on November 1, 1892, as aforesaid. On January 30, 1893, Edward McCarthy, Charles McCarthy, Emeline McCarthy and Mrs. L. E. Hensler executed a deed purporting to convey to the defendant corporation the land in question and other property, this being the only evidence of defendant's legal title to the land. Yet defendant objected to this deed as being irrelevant, and claims nothing under it. It was relevant, however, as tending to prove that Edward McCarthy consented to and acquiesced in the aforesaid conveyances by the trustee to the beneficiaries, and for this purpose it was, presumably, introduced by plaintiff.

The only grounds upon which appellant claims a reversal of the judgment are that the conveyances of the land by the trustee to the beneficiaries on November 1, 1892, were void for the alleged reason that they were made without the consent of all the beneficiaries, and that the finding by the court that all the beneficiaries of the trust did consent to and acquiesce in those conveyances is not justified by the evidence. The finding of the court is that "said J. I. Weed, at the request of Edward McCarthy, grantor of defendant, and with the consent of the other parties in interest, conveyed the entire property to the respective parties in interest, and that such conveyances were accepted by the various parties, and were acquiesced in by the grantor of this defendant and all other parties to said agreement [tripartite agreement] set out in defendant's answer." The evidence tending to prove this finding as applied to Edward McCarthy, grantor of defend-

ant, is (1) that he accepted and recorded a deed from Weed for twenty-five fortieths of the land on the same day (November 1, 1892) that deeds were made to all the other beneficiaries; (2) that he subsequently purchased the interests conveyed by Weed on the same day to two other beneficiaries, amounting to eight-fortieths of the land; (3) that thereafter, on January 30, 1893 (three months after the said conveyances by Weed), he conveyed all his interest in the land in question, then amounting to thirty-three fortieths, to the defendant corporation; and (4) there is no evidence or pretense that Edward McCarthy, or any one of the parties of the second part to the tripartite agreement, ever objected to any one of said conveyances by Weed of November 1, 1892, nor that the defendant corporation ever objected thereto before it filed its answer herein, on November 12, 1894—over two years after said conveyances were executed, and twenty-one months after it had accepted a conveyance of thirty-three fortieths of the land from Edward McCarthy, who claimed title under said Weed conveyances alone. I think this evidence, though merely circumstantial, is sufficient to justify the finding in question. Besides, it would not be consistent for the defendant to claim title to thirty-three fortieths of the land under or through the Weed conveyances, and at the same time to deny the title of plaintiff and others who claim the other seven-fortieths, from the same source. But, as before remarked, defendant professes to claim nothing in this action under the conveyance from Edward McCarthy of January 30, 1893, and therefore claims no title at all unless it was acquired from some other source, or in some other manner. There is no evidence, however, of any other title, legal or equitable, in the defendant, except an instrument purporting to be an assignment by Charles McCarthy, Minnie A. Austin, and Mrs. L. E. Hensler, by their attorney in fact, James P. McCarthy, to the defendant, of all moneys and property to which they (assignors) "may be entitled from the proceeds of the sales of the land described" in the tripartite agreement, and in the deed from Edward McCarthy to J. I. Weed, "which property was deeded to said J. I. Weed in trust for certain purposes in said agreement mentioned." Yet even this assignment bears no date, and there is nothing in the record indicating when it was executed. Edward McCarthy is named in the body of the instrument as one of the assignors, but he does not appear

to have signed it. Nor is there anything in the record indicating when the defendant was organized as a corporation. It is stipulated that, during all the transactions involved in this action, James P. McCarthy was the general attorney in fact for Edward McCarthy, Charles McCarthy, Mrs. L. E. Hensler, and Minnie A. Austin, and that he was president of the defendant corporation from its organization until the trial of this action. It is further stipulated that he expressly approved of the conveyances by Weed (of November 1, 1892) to plaintiffs Lyman and Thompson of the seven-fortieths not conveyed to Edward McCarthy. Therefore, at the time he executed said assignment for Charles McCarthy, Minnie A. Austin and Mrs. Hensler, he had actual notice of the conveyances by Weed to plaintiffs Lyman and Thompson of seven-fortieths of the land; and such notice to him was notice to said assignors for whom he acted as attorney in fact, and also notice to the defendant corporation (the assignee), of which he was then the president. It thus appears that at the time James P. McCarthy executed the assignment he was the agent of both parties thereto, and consequently both parties are chargeable with notice of all facts affecting or relating to the assignment then known to him, and, among them, the facts that, with his written approval, Weed had conveyed seven-fortieths of the land to plaintiffs Lyman and Thompson who had paid the stipulated purchase money therefor to Edward McCarthy, defendant's grantor, of all his interest in the land, which could have been only thirty-three fortieths. Moreover, the assignment does not purport to be an assignment of any interest in the land, nor of any specific interest in the tripartite agreement. It is merely a quitclaim of all right to moneys which the assignors "may be entitled to" from sales of the land, both parties to the assignment then knowing that seven-fortieths of the land had been conveyed to plaintiffs Lyman and Thompson, provided that the aforesaid conveyances by Weed were valid. Thus we are brought back to the questions first above stated and answered. It is unquestionable that the conveyances by Weed to the beneficiaries of the trust are valid if all the beneficiaries consented thereto at the time they were made, and thereafter acquiesced therein until the commencement of this action; and from the conclusion above arrived at, that the finding of such consent and acquiescence by the lower court is justified by the evidence, it neces-

sarily follows that the judgment and order appealed from should be affirmed.

We concur: Belcher, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

PETERSON v. MACHADO.

No. 19,591; February 7, 1896.

43 Pac. 611.

Easement.—A Deed Conveying “a Road and Right of Way over and across” land, “to be forever appurtenant to” adjoining land of the grantee, and providing that neither party shall, “nor shall his successors in interest, grant or give to any other person a right of way over said road,” conveys only an easement for a right of way, and not a fee simple title.

Easement.—An Injunction to Enjoin a Grantee of an Easement for a right of way from interfering with the grantor’s laying pipes beneath the right of way, to connect with a ram placed in a gulch which encroached on the right of way, should be granted, where the grantor offers to widen the right of way by moving his fence, or by changing the location of the ram, and filling up the gulch.

APPEAL from Superior Court, San Luis Obispo County.

Action by John Peterson against Domingo Machado for an injunction. From a judgment for plaintiff and an order denying a new trial defendant appeals. Affirmed.

Graves & Graves and F. A. Dorn for appellant; Wilcoxon & Bouldin for respondent.

BELCHER, C.—The plaintiff was the owner of a tract of land in San Luis Obispo county, which was bounded on its westerly side for a distance of about two thousand four hundred feet by a natural stream of water, known as “Sycamore” or “Los Osos” creek. He resided on this land with his family, his dwelling-house being about fifteen hundred feet distant from the creek, and was engaged in farming

the same, and raising stock, consisting of cattle, horses and hogs. The defendant owned two tracts of land, one adjoining the north side of plaintiff's land, and the other the south side thereof. In October, 1887, plaintiff, by an instrument in writing, granted and conveyed to defendant, and to his heirs and assigns, "a road and right of way for all purposes over and across the aforesaid land of Peterson, and to be forever appurtenant to the aforesaid land now owned by said Machado, which road shall be sixteen (16) feet wide, shall run along the east side of what is known as 'Sycamore' or 'Los Osos' creek, connecting the aforesaid two tracts of land now owned by said Machado, and the easterly line of which road is described as follows: [Setting out courses and distances.]" The instrument was executed by both parties, and contained numerous covenants to be kept and performed by them, and, among others, that within eight months said Machado "shall build and thereafter perpetually maintain one hog-tight fence along the east line of said road, as above described"; and that "said Peterson shall not, nor shall his successors in interest, grant or give to any other person a right of way over said road granted to Machado across the land of Peterson; and said Machado shall not, nor shall his successors in interest, give or grant to any person or persons who may be owners of his said land, or some part thereof, a right of way over said road." Subsequently, and about two years before the commencement of this action, plaintiff placed a water ram in the bed of the creek, where the same borders upon his land, and connected therewith a pipe, through and by means of which he conveyed water from the stream to his house, to be there used for domestic and culinary purposes and for watering his stock. The pipe crossed the roadway, but was there placed underground, and so as not to interfere with the use of the right of way. Afterward, in June, 1894, defendant dug up, cut and removed that part of the pipe which crossed the roadway, and thereby prevented the flow of any water from the said creek to plaintiff's house. This action was thereupon commenced to obtain an injunction restraining the defendant, his agents, servants and employees, from cutting or in any way interfering with the said pipe. The case was tried, and the court found that the defendant was the owner of an easement or right of way over the strip of land described, and, among other things: "(10) That the said ram was placed by

the plaintiff inside of said way, and inside of fourteen feet from the easterly line of said way, and the said plaintiff has placed eleven feet of pipe over and across the said way, underground; that the defendant's enjoyment of said way has never been, and is not, obstructed by said water ram and pipe. (11) The said stream in which said ram is placed runs through a gulch about six feet deep. Said gulch is along the west side of defendant's said way, and said ram is at the bottom of said gulch. Said gulch encroaches about six feet into said way of defendant at the point where said ram is placed. The road of defendant is on the bank of said gulch, six feet above said ram." Judgment was entered granting the plaintiff the relief prayed for, but providing: "That defendant is permitted to widen his road along said way by filling up or bridging over the gulch described in said findings where the same encroaches upon his way. That plaintiff has no right to use said way in any manner that will prevent defendant from using said way for a convenient road, or to prevent defendant from repairing his road in any manner to fit the same for his convenient use." From this judgment, and an order denying a new trial, the defendant appeals.

1. The first point made for a reversal is that the plaintiff, by the instrument above referred to, granted to the defendant the fee simple title to the strip of land described therein, and hence had no right to lay his water pipe across the strip. The Civil Code declares that "a fee simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended": Sec. 1105. But grants are to be interpreted in the same manner as other contracts (section 1066), so as to give effect to the intention of the parties, so far as that intention can be ascertained (section 1636); and, to ascertain that intention, "the whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other" (section 1641): *Pellissier v. Corker*, 103 Cal. 516, 37 Pac. 465; *Barnett v. Barnett*, 104 Cal. 298, 37 Pac. 1049. Tested by the foregoing rules, does it appear that the instrument in question here was intended to grant to the defendant a fee simple title? If it was so intended, why did it provide that the "road and right of way" are "to be forever appurtenant to" the land then owned by the grantee? "A thing is deemed to be incidental or appurtenant to land

when it is by right used with the land for its benefit, as in the case of a way . . . across the land of another": Civ. Code, sec. 662. Again, if it was so intended, why did it provide that the grantor "shall not, nor shall his successors in interest, grant or give to any other person a right of way over said road," and that the grantee "shall not, nor shall his successors in interest, give or grant to any person or persons who may be owners of his said land, or some part thereof, a right of way over said road"? Obviously, if the grantor had no title left in him, he could not grant or give to any other person a right of way over the road, and the provisions that he should not was useless; and, if the grantee had a complete title, he could give or grant a right of way over the road notwithstanding the provision that he should not. Looking at the whole instrument, we conclude, therefore, that its object and purpose were to grant a right of way, and nothing more.

2. The next point is that if the instrument conveyed only an easement, and not a fee simple title, still defendant had a right to dig up and remove the said pipe, because it obstructed and interfered with his right of way. The court below found directly against defendant on this point, and we think there was evidence tending to support the finding. It was proved that the bank of the creek where the ram was placed was from six to ten feet high, and was nearly perpendicular, and that from the fence to the top of the bank was about twelve feet. The road was therefore narrow at that point, and, as stated by defendant, it was difficult, if not impossible, to drive a four-horse team with a loaded header wagon over it. This was because there was quite a sharp bend in the road there, and also because there was a large sycamore tree standing near, which made the passage round the bend more difficult. Defendant testified that he wanted to cut down the tree, but plaintiff objected to his doing so, and "said the tree belonged to him, and not to do it. He says he sold me the right of way, but never sold me the timber." And one of his witnesses testified that "if the tree would be taken down, and you drive four horses, it will give your leaders more room to swing around the road where the bend is." The plaintiff testified: "I am prepared, at any time that defendant wishes to widen his driveway by putting in a bulkhead, to take my ram farther over, and would be willing to set my fence farther away. I told Machado that, whenever the rams interfered with his

road or his business, I would take them out of there; and, if he wishes to widen his road by putting in a bulkhead, I will take them away. The creek is very crooked; so is the road." In accordance with this offer, the judgment, as we have seen, permits the defendant to widen his road by filling up or bridging over the gulch described in the findings, where the same encroaches upon his way, and limits the plaintiff's right to use the way in any manner that will prevent defendant from using the same for a convenient road, or from repairing the same. As thus entered, the judgment promotes justice, and does no wrong to either party. There was no material error in the rulings of the court. The judgment and order appealed from should be affirmed.

We concur: Searls, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

SILVA v. SPANGLER.

S. F. No. 104; February 7, 1896.

43 Pac. 617.

Nuisance—Abatement—Pleading.—Under Code of Civil Procedure, section 430, the failure of a complaint, in an action to abate an embankment, to allege any damage to plaintiff different or peculiar from that resulting to the common public, is not a ground of demurrer, though, in a proper case, the objection may be urged, under a demurrer, on the ground that the complaint does not state facts sufficient to constitute a cause of action.

Pleading—Waiver of Objections to Complaint.—Under Code of Civil Procedure, section 434, providing that if objections to a complaint are not taken, either by demurrer or answer, the defendant must be deemed to have waived the same (with certain exceptions), the objection that a complaint is ambiguous or uncertain, that being a specific ground of demurrer, is waived, if not raised by demurrer.

Right of Way—Grant or Dedication.—The fact that a strip of land, over which a private right of way had been granted by the owner to two other land owners, to enable them to reach a highway from their land, is used, without objection, by others, going to and from their own lands, or the places of the two grantees, does not establish a dedication to the public.

Nuisance.—In an Action to Abate an Embankment, thereby throwing surface water over plaintiff's right of way, where there is no allegation that the right of way was a public one, it is unnecessary to allege any special injury differing from that resulting to the public.

APPEAL from Superior Court, Santa Clara County; John Reynolds, Judge.

Action by Emanuel P. Silva against Antonia Spangler. Decree for plaintiff and defendant appeals. Affirmed.

Wm. L. Gill for appellant; C. L. Witten and Jackson Hatch for respondent.

SEARLS, C.—This action is brought to abate an embankment constructed by defendant, whereby the surface water is alleged to be prevented from flowing from and over a private right of way owned and possessed by him, the said plaintiff, and to enjoin defendant from maintaining such embankment. Plaintiff had a decree as prayed for, and this appeal is from the judgment, and from an order denying defendant's motion for a new trial. The amended complaint of plaintiff was demurred to, upon two grounds, viz., "that said amended complaint does not state facts sufficient to constitute a cause of action," and upon the further ground "that plaintiff does not allege any damage different or peculiar than that resulting to the common public." The last cause of demurrer assigned is not one for which a demurrer can be properly interposed, under section 430 of the Code of Civil Procedure. The same cause may, however, be urged, in a proper case, under the objection that the "complaint does not state facts sufficient to constitute a cause of action." The contention of appellant seems to be based upon the theory that the amended complaint contains no allegation that the roadway in question is a private road, and that the complaint does not state in any allegation whether the road in question is a private or public road. In support of the last proposition we are referred to the case of *Grimes v. Linscott* (not officially reported; decided May 24, 1895), ante, p. 38, 40 Pac. 421. In that case, there was a demurrer interposed, upon the ground of ambiguity and uncertainty, which was sustained. By failure to raise this objection by demurrer in the present case, it was, under section 434, waived. We are unable to agree with appellant in his

deduction of facts from the amended complaint. Succinctly stated, the amended complaint avers that plaintiff and one J. P. Silva are now, and since October 27, 1884, have been, the owners and in the possession and enjoyment of a private right of way, for road purposes, over and along a tract of land, which is described by courses and distances and by metes and bounds, being thirty feet in width, and which was conveyed to them by Henry Curtner, by deed dated October 27, 1884, etc.; that plaintiff is the owner of a tract of land, containing fifty-three acres (describing it), used by him for farming purposes, and that his only means of egress and ingress thereto, and the only means of reaching any public highway therefrom, is by said private right of way described in the first paragraph of the complaint. Then follow allegations as to the ownership by defendant of forty acres of land south of and adjoining the strip of land of plaintiff, thirty feet wide, as aforesaid; that the land on the north of said roadway is higher, etc., and the land of the defendant is lower, than the roadway; and that, down the slope to and over the roadway, and over the land of defendant, the surface water, which in the rainy season is in large volume, has been accustomed to flow, etc.; that defendant constructed an embankment upon said roadway, and upon his own land adjoining, whereby the surface water was prevented from flowing down, and was penned back on the roadway, rendering it unfit for travel, and destroying all connection by roadway from plaintiff's land to any county or public road, etc. The further allegations in relation to injury, etc., need not be stated. In all the complaint, we fail to find any intimation that the strip of land, and the private right of way thereon, is a public highway, or that the public has any easement or right therein or thereto. The complaint states a cause of action, and the demurrer was properly overruled.

2. It is further objected by appellant that the evidence is insufficient to justify or support either the first or ninth findings of fact. These findings are to the effect that the strip of land thirty feet in width was a private right of way for road purposes, held, possessed and enjoyed by the plaintiff and J. P. Silva, as tenants in common, and that the said roadway so obstructed by defendant was at all times, "and is, a private right of way, and is not a public road or highway, and never has been." The evidence tended to show that in Octo-

ber, 1874, one Henry Curtner, owner of a larger parcel of land, conveyed to plaintiff and his brother, J. P. Silva, a parcel thereof, consisting of one hundred and thirteen and fifty-seven hundredths acres, and also a strip of land thirty feet wide as a right of way, for the purposes of a road extending from the land so conveyed to a public road or highway, which strip of land is accurately described by courses and distances. Plaintiff has succeeded by mesne conveyances to the ownership of the fifty-three acres of land described in his complaint. In 1887 defendant purchased from said Henry Curtner a tract of, say, forty acres of land, which is described as "commencing at a point in the southerly line of road, known as the 'Silva Road,' " and running thence along the southerly line of said road, etc., and as being bounded "on the north by said Silva road," etc. Henry Curtner, the former owner, testified as to his sale of the right of way to plaintiff and J. P. Silva, and said he had never conveyed this right of way to the county, or to any person other than the Silvas. He added: "It is, in fact, used by whoever chooses to pass over it, as every one does on private roads—go through them when they wish—generally pretty neighborly; . . . we let anybody go through that wishes it; it is an open thoroughfare. I don't shut up my place against no neighbors; there are no gates on it." Question: "Been used by the general public for years past?" Answer: "No, not by the general public, but those who have business in there," etc. Various of the witnesses spoke of the road as a public road or public highway, but generally without stating facts in evidence thereof, except that certain gates thereon had been removed; that the road was fenced, and that parties who have purchased land from Curtner bordering on the road have used it, or portions of it, to get to their land. All this was consistent with the idea of a license from plaintiff, and left the question of a dedication of the way to public use open to further inquiry. "No route of travel used by one or more persons over another's land shall hereafter become a public road or highway by use, or until so declared by the board of supervisors, or by dedication by the owner of the land affected": Pol. Code, sec. 2621. There is no claim that this road was ever declared a highway by the board of supervisors. It only remains, then, to inquire, Did the owners thereof dedicate it to the public use? It is said that "if the donor's acts are such as indicate an intention to appropriate

the land to the public use, then, upon acceptance by the public, the dedication becomes complete": Elliott on Roads and Streets, sec. 92. The question of intent is paramount, and, unless such intent expressly appears, or can be fairly inferred from the acts of the donor, there is no valid dedication: *People v. County of Marin*, 103 Cal. 224, 26 L. R. A. 659, 37 Pac. 203. Tested by this rule, the court was justified in finding that the way in question never became or was a public highway, and that it was and is a private way. The findings are ample to support the judgment. The judgment and order appealed from should be affirmed.

We concur: Belcher, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

YOUNGLOVE v. CUNNINGHAM.

S. F. No. 264; February 18, 1896.

43 Pac. 755.

Note—Pleading.—In an Action on a Note, the Complaint need not specially aver a consideration.

Appeal.—Where an Appeal Appears to be Frivolous, a mere oral assurance in argument that it was taken in good faith is insufficient to avoid the imposition of damages, but such assurance must find some support in the record.

APPEAL from Superior Court, Santa Cruz County; J. H. Logan, Judge.

Action by Dwight Younglove against James F. Cunningham on a promissory note. From a judgment for plaintiff, defendant appeals. Affirmed.

Spalsbury & Burke for appellant; Z. N. Goldsby for respondent.

PER CURIAM.—Action upon a promissory note. Judgment went for plaintiff, and defendant appeals therefrom upon the judgment-roll. The single point made in support

of the appeal is that the lower court erred in overruling a general demurrer to the complaint, the contention being that there is no averment in the complaint of a consideration for the execution of the note, and that hence there is a failure to state a cause of action. There is nothing whatsoever of merit in the point. It is not essential to the statement of a cause of action founded upon a contract in writing to specially aver a consideration. The writing imports a consideration (Civ. Code, sec. 1614), and the presumption thus arising is one of law, which is not required to be averred (*Henke v. Association*, 100 Cal. 429, 34 Pac. 1089). Appellant in fact conceded at the oral argument that his contention was untenable, but, in response to the demand made by respondent for damages as for a frivolous appeal, urged that when the appeal was taken, it was taken in good faith, and in the honest conviction that the point involved error. This assurance should come from the record, or at least find some semblance of support therein, which the record before us entirely fails to furnish. A party cannot be permitted to avoid the consequences of a wholly groundless appeal by indulging himself in a mere unsubstantial belief that there is merit in his case, when the slightest investigation would have assured him to the contrary. Such excuse, if held good, would require us to recall every penalty ever imposed in a like case. The judgment is affirmed, with \$100 damages, to be recovered by respondent as a part of his costs of the appeal.

CALIFORNIA LOAN & TRUST CO. v. HAMMELL.*

L. A. No. 5; February 24, 1896.

43 Pac. 955.

Appeal—Questions not Presented to Trial Court.—Where questions, the determination of which is essential to the full adjustment of the equities between the parties, were not presented to the trial court for determination, and the findings of that court upon the issues submitted are supported by the evidence, its judgment, warranted by such findings, will not be reversed on appeal.

*Rehearing denied.

APPEAL from Superior Court, Los Angeles County; Walter Van Dyke, Judge.

Action by the California Loan and Trust Company against James Hammell. Judgment for defendant and plaintiff appeals. Affirmed.

Walter Bordwell for appellant; Guthrie & Guthrie for respondent.

TEMPLE, J.—Appeal from judgment and from an order refusing a new trial.

One Wilkins owned land at Azusa; Goldsberry, a tract at Clearwater. They agreed to exchange lands. Goldsberry was to convey his tract clear of encumbrance and give \$2,000 difference—the \$2,000 to be secured by a mortgage on the Azusa property which he was to get from Wilkins. It was found that his land was mortgaged to one Tring for \$830; and Goldsberry, to pay this, agreed to mortgage the Azusa tract for \$830 more, and Wilkins assented to the change. Wilkins owed plaintiff about \$3,500, which was secured on the Azusa tract. Plaintiff consented to take, in lieu of this security, whatever Wilkins received in exchange. Accordingly, when the trade was consummated, Wilkins assigned the notes and mortgage which he received from Goldsberry to plaintiff, as collateral security, and also had the Clearwater tract conveyed to a trustee, also as security for his indebtedness to plaintiff. Subsequently Goldsberry paid both of his notes, and they were credited upon Wilkins' indebtedness. It appears incidentally—although neither party seems to think the circumstance of any importance—that plaintiff had assigned Wilkins' note with the security, and guaranteed its payment. Afterward plaintiff purchased the Tring mortgage, and brought this action to foreclose it.

It is contended by the defendant that, at the time of the execution of the \$830 note to Wilkins, plaintiff agreed to take the note, and, in consideration of it, to pay the debt secured by the Tring mortgage; in other words, that the \$830 note was not assigned to plaintiff as security for the payment of Wilkins' debt to it, but in consideration of its promise to pay the Tring debt. So far as it concerned the amount of Wilkins' debts, or the encumbrance upon the mortgaged premises, it did not matter upon which debt the \$830 was credited;

for Wilkins had assumed the Tring mortgage, and both constituted liens upon the same property. Upon whichever it was paid, therefore, Wilkins would get the benefit of it, and the premises would be relieved of the encumbrances upon it to just that amount. And the same is true as to defendant, who purchased the mortgaged premises from Wilkins. As both debts constituted encumbrances upon his land, upon whichever the \$830 was paid, he was relieved to the same extent. The only possible difference it could make to either Wilkins or defendant would be that, if the Tring debt became due first, by paying that off the time of payment would be extended, and there would be but one mortgage on his land, instead of two. It would be quite natural, therefore, for the parties to agree that plaintiff would take care of the Tring mortgage, and see that it was not foreclosed. The court found—and the finding is sustained by the evidence—that plaintiff did agree to pay the Tring debt with the \$830 received from Goldsberry. Instead of doing this, plaintiff assigned the Wilkins note, and passed to the assignee the \$830 note as collateral security, and, when paid, the money was credited on the Wilkins debt. This mistake did not harm Wilkins or defendant, unless he is called upon to pay the Tring debt before the Wilkins debt is due. The mere fact that money received by the mortgagee was credited upon the wrong note will not deprive the creditor of his lien. If the notes were still owned by plaintiff, the error could now be corrected, and the result would be that the Tring mortgage would be canceled, and the plaintiff would be permitted to collect the money upon its second mortgage. And if the Wilkins debt has been fully paid, and the \$830 was used in its payment, I see no reason why plaintiff should not be permitted to foreclose the mortgage in question here. It can make no difference to defendant on which mortgage he pays the money, which, in any event, is justly a burden upon his land. But the record does not show the facts which would entitle the plaintiff to that relief. Since no issue was made upon the question in the court below, and there is no finding, we are not permitted to conclude that plaintiff did guarantee to its assignee the payment of the Wilkins debt; and we do not know whether the Wilkins debt is due, or has been paid. Upon the facts found, plaintiff is not entitled to a foreclosure of his mortgage. The findings are sustained by evidence; and

although I may feel that justice has, somehow, miscarried, I do not see how, under the circumstances, it can be prevented in this case. The judgment and order are affirmed.

We concur: McFarland, J.; Henshaw, J.

**McGEE et al. v. SAN FRANCISCO AND NORTH PACIFIC
RAILWAY COMPANY.**

S. F. No. 231; February 25, 1896.

43 Pac. 1106.

Appeal.—A Verdict Based on Conflicting Evidence will not be disturbed.

APPEAL from Superior Court, City and County of San Francisco; W. R. Daingerfield, Judge.

Action by Charles McGee and others, by their guardian, James W. Collins, and another against the San Francisco and North Pacific Railway Company, a corporation. There was a judgment for plaintiffs and defendant appeals. Affirmed.

Sidney V. Smith for appellant; Shadburne & Herrin for respondents.

PER CURIAM.—This is an action for damages for personal injuries. The defendant appeals from the judgment and order denying its motion for a new trial, and by the record the sole question presents itself, Was the evidence sufficient to support the verdict of the jury? The action is brought by the guardian of certain minor children. The father of these minors was a passenger upon a train belonging to defendant, and, it is claimed by defendant, acted in a disorderly and boisterous manner while traveling upon said train. Defendant's servant, a brakeman, attempted to quiet this passenger, and, it is now claimed, used unnecessary force and violence in so doing. As a result of the difficulty arising at that time, the passenger received injuries from which he died within a few days. There were many eye-witnesses at the scene of trouble, who testified at the trial as to all the cir-

cumstances, showing the cause and manner of the passenger's injury. Counsel for appellant, by his brief, admits that such testimony was hopelessly contradictory, but insists that the evidence of certain physicians who professionally waited upon the deceased after the injury was received and prior to his death, and who also conducted the autopsy upon the body, plainly shows that the deceased could not have been injured as testified to by the witnesses introduced at the trial upon the part of the plaintiffs. While the evidence of the physicians may be strong in support of defendant's theory as to the manner in which the injury was received, still we cannot hold it conclusive, for there was direct and positive evidence from the lips of eye-witnesses to the contrary. Thus a substantial and material conflict upon the evidence was created, and this material and substantial conflict was a matter which it was peculiarly and essentially within the province of the jury to solve and determine. For the foregoing reasons the judgment and order are affirmed.

FLADUNG v. DAWSON et al.

S. F. No. 289; February 25, 1896.

43 Pac. 1107.

Action on Contract—Pleading and Proof.—Where a complaint in an action to recover for work and materials alleges that they were furnished under a contract, which fact is not denied by defendant, the only issue made being as to the contract price, it is error to admit evidence of reasonable value.

APPEAL from Superior Court, Santa Clara County; John Reynolds, Judge.

Action by one Fladung against Dawson and others and J. G. Adams. From a judgment for plaintiff against him defendant Adams appeals. Reversed.

Smith & Murasky for appellant; C. S. Hemphill for respondent.

HARRISON, J.—The plaintiff brought this action to recover from the defendant Adams for certain labor and

materials furnished by him, and to have the same declared a lien upon a certain building belonging to the defendant Dawson. The plaintiff, as a subcontractor, had furnished the materials and labor to Adams, who had contracted with Dawson for the construction of the building, and the materials and labor were furnished and used in such construction. At the trial it was shown that the building had been completed more than thirty days prior to the plaintiff's filing of his claim of lien, and he was denied a lien against the building, and judgment was rendered in favor of Dawson. The plaintiff, however, recovered judgment against Adams for the sum of \$1,015, from which, and an order denying a new trial, Adams has appealed.

The finding of the court that no special contract was made and entered into between the plaintiff and the appellant as to the amount that the appellant should pay plaintiff for his work and material is not only not sustained by the evidence, but is in direct opposition to all the evidence on the subject. The real issue which was contested at the trial was the price that had been agreed upon between them for the work, and not that there was no contract with reference to the amount to be paid therefor. The plaintiff testified: "We met, and went into the saloon, and he told me that he would give me \$3,335 to do the brickwork and the stonework and set the ironwork." "I gave Mr. Adams one written bid on this building, and I don't know now where it is. The amount was \$3,535." And, in explanation of the averment in the complaint that the sum of \$3,200 was agreed upon between them as the price of the work, he said: "It was at the suggestion of Mr. Adams that I charged \$3,200 for the work that I did. He told me that I had to take off a little. My written bid was \$3,535, and by an agreement with Mr. Adams it was changed to \$3,200." There was no testimony in the case that the work was to be done for what it might be worth, or that the plaintiff agreed to do the work without any agreement as to its price. On the contrary, the appellant offered in evidence a written bid for doing the work, with the plaintiff's name signed thereto, which he testified was received by him from the plaintiff, and had been written by the plaintiff upon one of his business cards, and signed by him, wherein he offered to do the work for \$2,226. The entire evidence on this point was that the price at which

the work was to be done was fixed by the bid of the plaintiff, and the court should have determined the amount of this bid, even though the testimony of the parties thereto was diametrically opposed: See *Leviston v. Ryan*, 75 Cal. 293, 17 Pac. 239. Instead of so doing, the court admitted evidence, against the objection of the appellant, of the value of the labor and material furnished by the plaintiff, and found that this value was \$3,160, of which the plaintiff had been paid a portion, and made this value the basis of its judgment. This finding was also outside of the issues made by the pleadings. The plaintiff had alleged in his complaint that he had entered into a contract with Adams to do certain work upon the building, "for which defendant Adams was to pay and agreed to pay to plaintiff the sum of \$3,200." The appellant did not deny the agreement, except as to the amount, which he alleged was the sum of \$2,226. The only issue before the court in this respect was, therefore, the amount which the appellant had agreed to pay for the work, and the court erred in admitting evidence of the value of the work done by the plaintiff, and in rendering its judgment in accordance with the value found upon this testimony. The judgment and order are reversed.

We concur: Garoutte, J.; Van Fleet, J.

**SOUTHERN CALIFORNIA RAILWAY COMPANY *v.*
SOUTHERN PACIFIC RAILROAD COMPANY et al.**

No. 19,553; February 27, 1896.

43 Pac. 1123.

Deed—Conveyance Subject to Easement for Street.—After a conveyance in fee of a strip of land known as a certain avenue, subject only to an easement in the public for road purposes, the grantor has no interest therein which he can convey to a subsequent grantee.

Railroad—Wrongful Acts in Street.—An Ordinance Granting a Railroad company the right to enter upon and construct a track through a public street does not operate to justify wrongful acts of such company as trespassers prior to the passage of such ordinance.

Railroad—Injunction Against Constructing Road.—Where defendant railroad corporation has been perpetually enjoined from en-

tering upon and constructing its road over private lands, such injunction must be modified so far as it prohibits the exercise of rights subsequently acquired by defendant under right of eminent domain.

APPEAL from Superior Court, San Bernardino County.

Action by the Southern California Railway Company, a corporation, against the Southern Pacific Railroad Company and the Pacific Improvement Company, corporations, and others, to restrain the construction or maintenance of a railroad track. From a judgment in favor of plaintiff and from an order denying a motion for a new trial defendants appeal. Affirmed.

Harris & Gregg for appellants; W. J. Hunsaker for respondent.

SEARLS, C.—This action is brought to restrain the defendants from constructing or maintaining a railroad track, and to compel them to remove all tracks and lines of track from a certain strip of land one hundred feet in width, and commonly known as "Park avenue," situate and being in the county of San Bernardino, and owned, possessed and appropriated by the plaintiff for the purposes of a railroad; also, to recover from defendants \$1,000 damages for injuries to said strip of land. The plaintiff had a decree in its favor, whereby it was adjudged that it was the owner of the land described in the complaint; that neither of the defendants had any right, title or interest therein or thereto, and perpetually restraining them and each of them from entering upon said land and premises, and from constructing, maintaining, or operating any line or lines of railroad, etc., thereon, and requiring them to remove therefrom, within ten days, all roads, tracks, ties, rails, switches, etc., and awarding plaintiff damages in the sum of one dollar, and denying to defendants the relief sought in their answer and cross-complaint. Defendants appeal from the decree, and from an order denying their motion for a new trial.

A very few facts will serve to illustrate the only important questions involved in this case. Plaintiff and defendant the Southern Pacific Railroad Company are both railroad corporations, and the defendant the Pacific Improvement Company is a corporation, and, as a contractor, was performing

for the other corporation defendant the grading, track-laying, etc., spoken of hereafter. The city of Redlands is a municipal corporation in the county of San Bernardino, and the strip of land described in the complaint, and known as "Park avenue," is a public street in said city. In 1886 one W. F. Summers was the owner in fee of the tract of land described as "Lugonia Park," including Park avenue aforesaid. In December, 1886, Summers contracted to sell all the land described in the complaint to George L. Cook and A. L. Park within eight months. Cook and Clark, on the twenty-eighth day of November, 1887, conveyed the strip of land, one hundred feet wide, known as "Park avenue," to the Central Railway Company, reserving from the conveyance "the right to use all of the above land not used by the railroad track for a public road or drive." The Central Railway Company constructed a railroad longitudinally through the center of said Park avenue, and the present plaintiff, by consolidation, has succeeded to all the rights and property of the former owner. Summers consummated his agreement to convey to Cook and Park by a deed of conveyance. The railroad of plaintiff is an ordinary steam railroad, constructed and operated for the transportation of freight and carriage of passengers. Subsequent to the purchase of the fee in said avenue by the grantor of plaintiff, and subsequent to the construction of its railroad, the defendant railroad corporation projected and located a like railroad, for like purposes through and over said Park avenue.

The basis of defendants' claim to a right in Park avenue is: (1) A conveyance to the Southern Pacific Railroad Company by deed of September 18, 1891, by W. F. Summers, of a strip of land thirty and one-half feet wide on the south side of said Park avenue, reserving all of the above-described land not occupied by the railroad track for a public road or drive. (2) An ordinance of the board of trustees of the city of Redlands passed March 2, 1892, authorizing the Southern Pacific Railroad Company to lay down, maintain, and use a railroad track upon and along the southerly thirty and one-half feet of Park avenue. This action was commenced December 31, 1891, and on the twenty-third day of November, 1892, defendants, by a supplemental answer and supplemental cross-complaint, set up the passage of the ordinance above mentioned. The allegations of the complaint and findings

of the court are sufficient to warrant the judgment if defendants were not entitled to enter upon and interfere with the track, right of way and property of plaintiff thereon. The deed to plaintiff's predecessor being prior in time to that to the railroad defendant, and conveying in fee the whole of Park avenue, subject only to an easement in the public for road purposes, the defendants acquired no right thereto by the subsequent conveyance; and hence, at the date of their intrusion upon the property and rights of plaintiff, defendants were trespassers.

Whatever rights were conferred upon defendants by the ordinance granting to the Southern Pacific Railroad Company the right to construct its road through Park avenue, it could not operate to justify or extenuate the wrongful acts of the defendants perpetrated many months prior to the passage of such ordinance. So, too, it is probable that defendants could not by and under such an ordinance so far justify their active interference with the plant of plaintiff, and thereby prevent the issuing of a perpetual injunction against them. We deem this question of little importance here, for these reasons: Subsequent to the rendition of the decree and perpetual injunction in this case, the Southern Pacific Railroad Company commenced an action against the plaintiff herein, under the right of eminent domain, to condemn a right of way for its railroad over the southerly side of this same Park avenue, and such proceedings were had therein that a right of way was condemned to the plaintiff therein for its said railroad through said avenue; and upon an appeal to this court the judgment of condemnation was affirmed, on the thirty-first day of January, 1896: See 111 Cal. 221, 43 Pac. 602. By virtue of the title acquired by the Southern Pacific Railroad Company in said condemnation proceedings, it will become the duty of the superior court in and for the county of San Bernardino, upon application, to so modify its perpetual injunction herein that it shall not apply to or prohibit the exercise of the rights obtained under the judgment in condemnation.

It follows that except as to the matter of one dollar damages awarded to plaintiff, and as to costs. this cause is and has become mainly a moot case, not calling for extended discussion. We think the evidence justified the findings and

the latter support the decree. The judgment and order appealed from should be affirmed.

We concur: Haynes, C.; Britt, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

PEOPLE'S DITCH COMPANY v. '76 LAND AND
WATER COMPANY et al.

Sac. No. 41; March 10, 1896.

44 Pac. 176.

Parties—Bringing in After Issue Joined.—Under Code of Civil Procedure, sections 379, 389, providing that one having an interest in the controversy, or whose presence is necessary to a final determination of it, may be brought into an action as defendant, the court may order one who purchased rights in the property in controversy after issue joined on the original complaint to be made defendant by an amended complaint.

A De Facto Corporation may Sue and Assert its corporate character as against the world, except in a direct proceeding by the attorney general to test its right to its franchise.

Appeal.—Where There is a Sharp and Substantial Conflict of evidence, the findings of the trial court will not be disturbed.

APPEAL from Superior Court, Tulare County.

Action by the People's Ditch Company against the '76 Land and Water Company and the Alta Irrigation District to enjoin a diversion of water. From a judgment in favor of plaintiff and from an order denying a new trial defendants appeal. Affirmed.

W. S. Goodfellow and C. W. Cross for appellants; Bradley & Farnsworth and Alfred Daggett for respondent.

PER CURIAM.—Appeal from the judgment and from an order denying a new trial in an action by the respondent, as a prior appropriator, to enjoin the defendants from diverting water from Kings river so as to interfere with respondent's

appropriation; judgment being in favor of respondent, enjoining such diversion.

1. The demurrer of the defendant Alta Irrigation District to the amended or supplemental complaint making it a defendant, upon the ground that it was improperly joined as a defendant in the action, was properly overruled. That defendant having, subsequently to issue joined on the original complaint, taken a conveyance from the '76 Land and Water Company of all the latter's rights to divert the waters of Kings river, together with its canal and ditches by means of which such diversion was made, and under which conveyance the vendee claimed the right to make diversion of the waters of said river to the like extent claimed by its vendor, it clearly became a necessary party to a complete determination of the controversy; and, that fact being brought to the attention of the court, it was properly ordered that the vendee be brought in as a defendant: Code Civ. Proc., secs. 379, 389; *Robinson v. Gleason*, 53 Cal. 38.

2. Assuming that the defendants' objection to the introduction in evidence of plaintiff's articles of incorporation, for their want of strict conformity to the requirements of the Civil Code, should have been sustained, the error in admitting the paper is without prejudice. The complaint alleged that the plaintiff was at the commencement of the action, and since the year 1872 has been, a corporation duly incorporated under the law, and since said date has been acting in good faith as such corporation, and there was evidence sufficient to support the finding of the court as to the de facto character of the corporation. This being so, it became immaterial whether plaintiff was in fact a corporation de jure or not, since its de facto character entitled it to maintain the action, and assert its corporate character as against all the world except the state in a direct proceeding by the attorney general to test its right to such franchise: Code Civ. Proc., sec. 358; *People v. La Rue*, 67 Cal. 530, 8 Pac. 84.

3. The point most seriously contended for is that the evidence does not support the findings in certain material respects; and, by reason of such contention, we have carefully reviewed the evidence contained in a somewhat voluminous record. As a result of such examination, we are constrained to hold that the contention cannot be sustained. While, in one or two particulars, we are inclined to think the evidence

preponderates somewhat in favor of the view of the facts as contended for by defendants, we are nevertheless satisfied that in these respects, as in all others, there is a sharp and substantial conflict, which fact precludes us from disturbing the findings of the trial judge. The judgment and order are affirmed.

PEOPLE v. ST. CLAIR.

Crim. No. 91; March 17, 1896.

44 Pac. 234.

Larceny—Evidence.—A Conviction of Larceny of a Horse and cart will not, after denial of a new trial, be disturbed, where there was evidence that the property was stolen; that defendant, when seen, shortly afterward, traveling away with it from the scene of the larceny, tried to evade identification, and when arrested with the property, a few hours afterward, twenty-three miles away, made false statements in explanation of his possession.

APPEAL from Superior Court, San Joaquin County; Joseph H. Budd, Judge.

Frank St. Clair was convicted of grand larceny, and from the judgment and an order denying a new trial he appeals. Affirmed.

J. G. Swinnerton and A. V. Scanlon for appellant; Attorney General Fitzgerald for the people.

PER CURIAM.—Defendant was convicted of grand larceny, and now appeals, insisting that the evidence is insufficient to support the verdict. The jury passed upon its sufficiency, and the trial court also did, when it denied a motion for a new trial. Under these circumstances, this court will not hold the evidence insufficient to support the verdict, unless defendant's guilt has no support therein. In this case a larceny of a horse and cart was committed. A short time thereafter the defendant was seen in possession of the property, traveling rapidly away from the scene of the larceny. At this time, when seen, he acted suspiciously, as though trying to evade identification. A few hours thereafter he was

arrested twenty-three miles from the scene of the larceny, still traveling in an opposite direction, with the property in his possession. When arrested he made false statements in explanation of his possession. Upon this state of facts, we will not disturb the verdict of the jury. Judgment and order affirmed

EPPINGER et al. v. KENDRICK.*

Sac. No. 46; March 17, 1896.

44 Pac. 234.

Pleading.—In an Action on a Note Against One as Surety, defendant denied the suretyship, and alleged that he joined in the execution for the accommodation of plaintiff, and that, if he were liable as surety, the principal maker had put in plaintiff's hands sufficient wheat to pay the note, and directed that the proceeds thereof be applied thereon, and that plaintiff did not so apply them. Held that, though the defenses were not separately pleaded, the answer was sufficient, when questioned, for the first time, on motion to exclude evidence offered thereunder.

Pleading.—In an Action on a Note, on the Issue as to whether defendant signed the note for the accommodation of the maker or for the accommodation of plaintiff, the payee, to enable him to use it as collateral, the testimony of defendant and the agent who acted for plaintiff in securing defendant's signature was directly contradictory. There was evidence of subsequent circumstances which, on their face, appeared contradictory of defendant's claim, but, as explained by him, did not discredit his testimony. Held, that a verdict for defendant would not be disturbed.

Pleading.—Where Inconsistent Defenses are Pleaded, neither can be used as an admission to destroy the other.

Notes—Evidence.—Where, in an Action on a Note, Defendant claims that he signed the note merely for the accommodation of plaintiff, to enable him to use it as collateral, and has already testified as to the circumstances of the transaction, as claimed by him, it is not prejudicial to plaintiff to permit defendant to be asked as to what was his understanding as to the purpose of his signature.

Notes—Consideration.—Where There is No Evidence to Show any consideration for a note, other than the circumstances disclosed in the statement of counsel, preceding a question asked by him as to whether there was any other consideration, permitting such question to be asked is not prejudicial.

*For subsequent opinion in bank, see 114 Cal. 620, 46 Pac. 613.

APPEAL from Superior Court, Glenn County; S. Millington, Judge.

Action by Eppinger & Co. against J. K. Kendrick and another. From a judgment for defendant Kendrick and an order denying a new trial plaintiffs appeal. Affirmed.

Geis & Kelly for appellants; Hurst & Hurst and C. L. Donohoe for respondent.

HAYNES, C.—This action was brought against M. P. Farnham and J. Kendrick upon two promissory notes, each dated August 19, 1891, payable one day after date, one for \$2,000 and the other for \$800, to the order of Eppinger & Co., upon which there was claimed to remain unpaid \$1,119.04 and interest. Farnham, having been adjudged an insolvent debtor, did not answer, and the action proceeded against Kendrick alone, whose answer consisted of a general denial and a special defense, in which it was alleged that on September 12, 1887, Farnham was indebted to the plaintiffs in the sum of about \$6,000, and, at the request of Oscar C. Schultz, manager and agent for said plaintiffs in their mercantile business at Germantown, he executed, with Farnham, a promissory note for \$2,000, payable to the order of the plaintiffs one day after date, with interest at the rate of one per cent per month; that he executed the same upon the representation of said Schultz that plaintiffs needed money, that Farnham's note was not good as collateral security, and that his (Kendrick's) name would be used for no other purpose than to make the note good as collateral security at the bank; and that the notes in suit were given in renewal thereof, that he did not execute any of the notes at the request of Farnham, and that, as to him, they were without consideration. It was also alleged that, in 1890, Farnham delivered to plaintiffs a quantity of wheat sufficient to have paid said note, with the request that it should be applied thereon, but that Schultz said that he wanted to use the note longer, and he would see Kendrick, and obtain his consent, but did not do so; that he received no consideration for the execution of any of the notes; and that Farnham did not request him to execute them. The jury returned a verdict for the defendant, and this appeal is from the judgment entered thereon, and from an order denying a new trial.

Plaintiffs' motion for judgment on the pleadings was properly denied. Whether the general denial was sufficient to prevent judgment, in the absence of proof, need not be considered.

Plaintiff also objected to evidence under the special defense, upon the ground that it does not state facts sufficient to constitute a defense. The special defense, so called, really contains two special defenses: (1) That defendant was not Farnham's surety, but joined in the execution of the notes for the accommodation of the plaintiffs, to enable them to raise money upon them as collateral; and (2) that, if he were liable as surety, the principal maker had put in plaintiffs' hands sufficient wheat to pay them, and directed that the proceeds be applied upon the original note, and that they did not so apply it. These defenses should have been separately pleaded; but no objection was taken by motion to require them to be separately stated, nor by special demurrer for ambiguity or uncertainty. Though defectively pleaded, the answer stated a defense, and the objection to evidence upon that ground was properly overruled. So, too, the objection that the agency of Schultz for the plaintiffs is not sufficiently alleged cannot be sustained. The answer in that regard is sufficient, as against an objection to evidence, though defectively pleaded, whatever might have been held if it had been specially demurred to.

The question principally discussed by counsel goes to the sufficiency of the evidence to justify the verdict. The defendant testified that, at the time the original note was executed (September 12, 1887), Mr. Schultz came to him, and said the plaintiffs needed money, that Farnham was owing them, and that he wanted him to go on Farnham's note so that they could use it as collateral; that Farnham did not request it; that defendant declined to execute it, but Schultz appealed to him, reminding him that he had accommodated him in many ways, that as a friend he wanted him to sign it so he could use it as collateral, and he then agreed to do so; and that the notes in suit were renewals, without any new agreement or consideration. Mr. Schultz testified, in relation to the making of the original note, as follows: "Mr. Eppinger had been up and saw that the account was very large, and said the account had to be reduced, told me to go out and see Farnham, which I did, and told him what Mr. Eppinger

said. Mr. Farnham said he could not pay at present, and stated he had consummated a transaction with Mr. Kendrick on a patent plow, and was willing that I have the royalty. I told him that wasn't satisfactory to my people at all. I then says, 'If Mr. Kendrick will sign your note with you for \$2,000, you can secure Kendrick by allowing him to retain the royalty on the plows he is to manufacture, as security for the money.''' These statements of defendant and Schultz are materially conflicting; but appellants contend that the other evidence given by and on behalf of defendant renders defendant's statement as to the transaction so improbable that the court cannot consider it, and that therefore there is no material conflict. One of these items of evidence relates to the plow contract. Some time prior to the making of said note, a contract was made between Farnham and Kendrick, by which Kendrick was to manufacture a patented plow for Farnham, under which Farnham was to receive a royalty of \$10 for each plow sold; and, at the suggestion of Schultz, at the time the original note was made, an additional agreement was made by which Kendrick was to retain the royalty to the extent of \$2,000, and pay the same to plaintiffs; and, if Farnham should otherwise pay the note, this latter agreement should be canceled. Schultz learned of the plow contract when he went to see Farnham, and that, we may reasonably suppose, led Schultz to make the effort to have Kendrick go upon Farnham's note. It should not be overlooked that Schultz nowhere denies that he, and not Farnham, requested Kendrick to go on the note; nor did he deny that he represented to Kendrick that he wanted his signature to enable him to use it as collateral with which to raise money; nor was Schultz's suggestion that Farnham should secure defendant by allowing him to retain and apply the royalty upon the note inconsistent with that purpose. Kendrick did not solicit security from Farnham, but this contract was made at Schultz's suggestion, and was written and retained by him, and the plaintiffs thereby obtained from Farnham whatever security the royalty afforded.

Appellants contend, however, that it is not reasonable that plaintiffs, if they desired to use the note as collateral, would have made it payable one day after date. But, on the other hand, it may be said that, if Kendrick's purpose was to secure the plaintiffs' claim against Farnham, it is equally improb-

able that he would have placed himself in a situation in which he was liable to be sued the second day thereafter, instead of stipulating for time to enable Farnham to pay. So far, therefore, as the evidence relates to the making of the original note, the evidence is sufficient to justify the jury in finding that defendant was an accommodation maker for the benefit of plaintiffs. The notes here in suit were given in renewal of the former note, the one for \$2,000 representing the principal, and the one for \$800 representing the interest. There does not appear to have been any new consideration, or any new agreement or understanding at the time they were executed; and defendant testified that they were to be used in place of the other note. The circumstances relied upon by plaintiffs to show that the notes were not executed by Kendrick, otherwise than as security for Farnham, occurred afterward. There is credited on one of these notes, September 7, 1892, \$714.32, and on the other, at the same date, \$285.68, making, together, \$1,000, and that payment was made by a check drawn by the Bank of Willows on the Bank of California to the order of Mr. Kendrick, and therefore appeared to have been made by him; but he testified that it was Farnham's money, and came from his wheat, and was represented by another check, which he took to the bank at Willows, and got its check on the Bank of California for it. According to the testimony of Mr. Kendrick, Schultz never demanded any payment from him until in July, 1892, and that that was the first time Schultz said or did anything showing that he held him personally liable, and that defendant then denied his liability; that Schultz then said, "You live right here by Mr. Farnham, and you can take a crop mortgage on his crop, and get your money from Farnham. We live down at Dixon, and we do not have the opportunity. Hochheimer & Co. will take what he has, and we cannot get it." Kendrick took a crop mortgage from Farnham, but the date of the mortgage I do not find. On June 6, 1893, Kendrick sold to plaintiffs fifty tons of wheat at \$1.15 per hundred, to be delivered in July, the proceeds to apply on these notes, and this makes the amount of the only other credit upon the notes, amounting, together, to \$1,156.73, credited on July 15, 1893. On July 4th, prior to this delivery, Kendrick wrote Schultz, in reply to some communication from him, as follows: "Dear Sir: I have just telegraphed you, 'I would with one prop-

osition. See letter.' You said, when here, I could have all month. I mean I will ship immediately with this proposition: Those notes are to be taken up when I pay the \$1,000 this month, and a new one made payable 1st of August, 1894. The note will be just as good, and if there is any crisis I will not be compelled to pay it until the time we agreed I could have when you were here.'" Mr. Kendrick wrote another letter two days later of similar import. The first of these letters was evidently written in reply to some communication from Schultz urging an immediate shipment of the wheat, which, under the contract, was to be shipped in "July." Mr. Kendrick explains what he did by saying he was informed by Schultz that his company was in a bad fix, and, he inferred, "were liable to go under"; that he did not want these notes outstanding; that he "wanted a note that could not touch them for a year," so he could get the wheat out of Farnham's crop, and that was why the letters were written; that he was afraid the company might break up, leaving the notes in the hands of others. That there were grounds for this fear appears from Schultz's letter to him of July 18, 1893, in which he said: "During this awful stringency of money, every available thing was sent to the city, so that it may be some few days before I can get your old note." I fail to find, in any of the transactions subsequent to the making of these renewals, any conclusive evidence affecting the uncontradicted testimony of the defendant as to the circumstances and representations attending the original transaction. Upon the face of some of these subsequent transactions, they would appear to be inconsistent with defendant's claim; but, as explained by him, they do not so affect his testimony as to remove the conflict conceded to exist between the testimony of Schultz and Kendrick as to the original transaction. Besides, defendant was corroborated to a greater or less extent by Farnham and some other witnesses. Upon this branch of the case we cannot say that the jury were not justified in finding for defendant.

This conclusion makes it unnecessary to consider whether the plaintiffs were bound to apply the proceeds of the wheat delivered to them by Farnham in 1889 upon the old note, nor whether the answer of defendant was such as to make that claim available as a defense. It is well settled that a defendant may plead as many defenses as he may have, though

they are inconsistent, and neither of two inconsistent defenses can be used as an admission to destroy the other.

Appellants also contend that the verdict is against law, because it is in disregard of ten different instructions given them by the court. These instructions cannot be repeated here. We have examined each one, and each instructs the jury that, if they find, from the evidence, that certain facts exist, their verdict must be for the plaintiffs; but whether those facts exist was a question for the jury. So that the question is not whether there was a palpable violation of the instructions, but whether the evidence justified them in finding upon these facts as the verdict shows they must have done in order to find for the defendant. The fourth instruction given at defendant's request, relating to the alleged failure of plaintiffs to apply the proceeds of the wheat delivered to them by Farnham in 1889 in payment of the original note, need not be considered, as the verdict of the jury can be sustained under the defense that Kendrick was, as to the plaintiffs, an accommodation maker.

The defendant was asked by his counsel the following question: "At the time of the signing of these renewal notes, what was your understanding as to the purpose of your signature thereto?" Plaintiffs were not prejudiced by the ruling permitting it to be answered. The witness had already testified to the circumstances surrounding the transaction, that he did not sign them for Farnham, that he was not asked to become security for Farnham, that he received no benefit or anything of value, and that the request therefor came from the plaintiffs. The answer was that "it was to be used in place of other note," and there was no evidence to the contrary. The following question was also objected to: "Was there any other or further consideration for the signing of the new notes, other than the \$2,000 note that had been previously given?" This question also followed a statement which appeared to be a full recital of all the circumstances connected with the transaction, and was doubtless intended to cover any other possible consideration; and, in the connection in which it was put, cannot properly be considered a conclusion of law. But, if it were so, as there was no evidence tending to show any consideration other than the circumstances already disclosed, we cannot see that plaintiffs were prejudiced.

We are also referred, by folios, to numerous other exceptions taken by appellants, and which are not argued, nor even restated, in appellants' brief. We have, however, examined each of them, and find no error justifying a reversal. We advise that the judgment and order appealed from be affirmed.

We concur: Britt, C.; Vandelief, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

ERTLE v. PLACER COUNTY et al.

Sac. No. 69; March 18, 1896.

44 Pac. 229.

Jurisdiction of Supreme Court—Amount Involved.—The supreme court has no jurisdiction of an appeal from an order, made after final judgment, refusing to strike out plaintiff's cost bill, which amounts to less than \$300.

APPEAL from Superior Court, Placer County; W. H. Grant, Judge.

Action by John Ertle against Placer county and others. From an order made after final judgment defendants appeal. Dismissed.

L. L. Chamberlain and F. P. Tuttle for appellants; Ben. P. Tabor and John M. Fulweiler for respondent.

PER CURIAM.—This is an appeal from an order of the superior court, made after final judgment, denying defendants' motion to strike out plaintiff's cost bill, amounting to only \$65.45. The only ground of the motion was that the memorandum of the items of costs, though properly verified and filed with the clerk, was not served on the defendants within the time prescribed by section 1033 of the Code of Civil Procedure. As the whole amount of costs claimed by plaintiff was less than \$300, this court has no jurisdiction of the appeal: Fairbanks v. Lampkin, 99 Cal. 429, 34 Pac. 101. Therefore the appeal is dismissed.

In re THOMAS.*

S. F. No. 91; March 21, 1896.

44 Pac. 327.

Voluntary Insolvency—Petition for Discharge.—Under insolvent act of 1880 (Append. Code Civ. Proc.), sec. 2, which provides that one owing over \$300 may file a petition for discharge from his debts in a county where he has resided the six months preceding the filing, and provides that, in the petition, the petitioner shall "set forth his place of residence," a petition need not allege that the petitioner resided in the county where the petition was filed the six months preceding the filing thereof.¹

APPEAL from Superior Court, Alameda County; A. L. Frick, Judge.

Petition by Richard P. Thomas to be declared an insolvent under act for relief of insolvent debtors. From an order adjudging the petitioner an insolvent, one of his creditors appeals. Affirmed.

Stateler, Pierson & Mitchell and R. A. Friedrich for appellant; Thos. C. Kierulff for respondent insolvent; A. W. Thompson for respondent assignee.

PER CURIAM.—This is an appeal by a creditor from an order adjudicating one Thomas an insolvent debtor. It is insisted that the court had no jurisdiction to make the order of adjudication, by reason of a want of sufficient averment of facts in the petition of the insolvent. Insolvent act, section 2 (Append. Code Civ. Proc.), provides: "An insolvent debtor, owing debts exceeding in amount the sum of three hundred dollars, may apply by petition to the superior court of the county or city and county in which he has resided for six months next preceding the filing of his petition to be discharged from his debts and liabilities." It is now claimed

*Rehearing denied.

¹ Cited and approved in In re Chope, 112 Cal. 633, 44 Pac. 1067, as authority for saying that a petitioner must be prepared to establish as a fact his allegation that he is unable to pay his debts and is an insolvent debtor within the true intent and meaning of the law of 1880.

that the petition only showed that the insolvent had resided in the county for six months next preceding his signing and verifying the petition. The latter portion of section 2 sets forth the particular matters which must be alleged by the petition of the insolvent, and that provision says he must "set forth his place of residence." There is no requirement that he must state in his petition that he has resided in the county where the petition is filed six months next preceding the filing thereof, and we hold that an averment to that effect is not required. Subsequently to the adjudication, if creditors desire to contest that question of fact, the road is plain to them. A statement in the petition to that effect would not be conclusive upon the creditors, for they could attack its truth at a subsequent stage of the proceedings; and it is the fact of an immediate preceding residence of six months in the county where the petition is filed, and not the allegation to that effect, that is jurisdictional. We see no substantial merit in this appeal. For the foregoing reasons the order appealed from is affirmed.

SUSSKIND v. HALL et al.

L. A. No. 33; March 23, 1896.

44 Pac. 328.

Attachment—Mingling of Goods—Illegal Seizure.—The fact that goods of an attachment defendant are in the possession of a third person, who has mingled them with his own goods, and refuses to point them out, but claims ownership of all, does not warrant the seizure of goods, his title to which is unquestioned, and which are readily distinguishable from those of the attachment defendant.¹

Attachment.—A Notice to an Officer of a Claim of Ownership of attached property is not vitiated by the statement therein that the claimant is the owner of all the property "except a portion owned by" another, who is not a party to the action.

APPEAL from Superior Court, Los Angeles County; J. W. McKinley, Judge.

¹ Cited in Hall v. Susskind, 120 Cal. 562, 53 Pac. 47, as part of the history of the case.

Action by Henry Susskind against J. C. Cline as sheriff, A. I. Hall, assignee, intervener. Judgment for the intervener and plaintiff appeals. Reversed.

Wells & Lee and Calvin Edgerton for appellant; Graff & Latham for respondents.

BELCHER, C.—In 1892, Mrs. L. M. Wagner was engaged in the jewelry business in the city of Los Angeles, the business being chiefly managed by her husband, J. B. Wagner. Her store was at No. 125 South Spring street, and in it she had been accustomed to keep a large stock of goods, consisting, among other things, of diamonds, watches, and jewelry. On September 28, 1892, she filed in the superior court of Los Angeles county her voluntary petition in insolvency, and was thereupon adjudged to be an insolvent debtor. Thereafter A. I. Hall was duly elected and qualified as assignee of the estate of the insolvent, and on November 2, 1892, the clerk of the court, by an instrument in writing, assigned and conveyed to him all the estate, real and personal, of the debtor. The assignee at once took possession of all the goods and property in said store, and held possession thereof till November 16, 1892, when, under an order of the court, he sold the same at public auction to Henry Susskind, the plaintiff herein, he being the highest and best bidder, for the sum of \$7,100. The property sold consisted of a great variety of articles, including the fixtures and a safe, of which a list or inventory is presented, covering about thirty-three pages of the transcript. The purchase price was paid and the sale was reported to and confirmed by the court. Susskind immediately took possession of the property purchased, obtained a new lease of the store, and thereupon commenced and thereafter continued the business of selling such goods and of buying and selling other goods of a similar character, until July 26, 1893. On the last-named day all the goods and property then in the store were seized and taken possession of by J. C. Cline, the sheriff of Los Angeles county, as the property of L. M. Wagner, the insolvent, under a writ of attachment issued in an action commenced by M. Wunsch et al. against her in the superior court of that county. Susskind on the same day notified the sheriff that the property taken was his, and demanded a return thereof, but his demand was refused.

He thereupon commenced this action to recover the possession of said property or the value thereof, alleged to be \$20,000, and damages.

The property sought to be recovered is described in the complaint as "a stock of jewelry consisting generally of various articles of gold and silver and plated jewelry, watches, chains, ornaments, also a lot of silverware and plated silverware, lot of fixtures, one safe, lot of diamonds and other precious gems, lot of money, lot of jeweler's tools and implements, shelving, counters, clocks, all situate and contained in that certain store and premises in the city of Los Angeles known and designated by city number 125 South Spring street." The sheriff answered, denying, for want of information or belief upon the subject sufficient to enable him to answer the allegations of the complaint, that on the twenty-sixth day of July, 1893, or at any other time, plaintiff was the owner, or in possession, or entitled to the possession, of the goods and chattels described in his complaint, or that he, the defendant, wrongfully took the said goods and chattels from the possession of the plaintiff, or unlawfully withheld the same from the plaintiff; and alleging that he took the said property under and by virtue of a writ of attachment, as hereinbefore stated. On the same day this answer was filed, A. I. Hall, the assignee of the insolvent's estate, asked and was permitted to intervene in the action. In his complaint in intervention he set up the facts of the insolvency of Mrs. Wagner, her voluntary petition in insolvency, his election and qualification as assignee, the assignment of the estate to him by the clerk of the court, and his taking possession, as such assignee, of all the property of the estate that he was then able to find, his settlement of the estate and final discharge, as such assignee, on May 24, 1893, and the vacation and setting aside of that discharge by an order of the court on September 1, 1893. He then alleged: "That the said Henry Susskind, before the said discharge of said intervener as such assignee, conspired with said insolvent and J. B. Wagner, her husband, to secrete and conceal a portion of said insolvent estate, consisting of diamonds, watches and jewelry, to prevent the same from coming into the possession of said intervener as such assignee, a particular description of which property so concealed is unknown to said intervener, but is known to the plaintiff, Henry Susskind; and

said insolvent did secrete and conceal said property; and Henry Susskind afterward received and took possession of said concealed property, knowing that it was a part of said insolvent's estate at the time of filing her petition in insolvency, and that the same had not been delivered by said insolvent to her said assignee. That the said intervener did not know that said property, or any part thereof, had been concealed, or that said defendant had taken possession thereof, or had disposed of any part thereof, until after the discharge of the intervener as assignee of said insolvent's estate. That the property was taken by the sheriff under a writ of attachment, as before stated, and was still held by him, a schedule of the property taken being appended. That the said stock so taken by virtue of said writ was a part of the estate of said insolvent debtor concealed and withheld by her from said assignee. That said Henry Susskind, for the purpose of defrauding said estate, is wrongfully claiming to be the owner of and entitled to the possession of said property so taken and held by said J. C. Cline as sheriff, but said Henry Susskind has no right, title, or interest therein." And the prayer was that the intervener, as assignee of the insolvent's estate, have judgment for the possession of said property. The plaintiff answered the complaint in intervention, denying all of its material averments.

The case was tried without a jury, and, among other things, the court found: "That prior to the filing of said insolvent's petition in insolvency a portion of said insolvent's estate, consisting of diamonds, watches and jewelry, was secreted so as to prevent the same from coming into the possession of said intervener as such assignee, and to prevent the same from being distributed among said insolvent's creditors by such intervener as such assignee. That the plaintiff, after the secreting and concealing of said goods, and knowing that said goods had been secreted and concealed, and for the purpose of preventing the same from coming into the possession of said assignee, received and took possession of said concealed property, and, after selling a portion thereof, retained possession of the remainder thereof" until July 26, 1893, "when the said property was taken by the defendant as the sheriff of said county, by virtue of said writ of attachment, at which time they were so mixed and confused by said plaintiff with other goods that they were not distinguishable from them;

and plaintiff neglected and refused to point out and distinguish in said stock taken by said sheriff by virtue of said writ of attachment the goods owned by him prior to said confusion and mixing therewith of said diamonds, watches and jewelry concealed and secreted by said insolvent, and also failed and neglected and refused to point out and distinguish the said watches, diamonds and jewelry so secreted and concealed by said insolvent, and mixed and confused by him with said other goods. That plaintiff, in taking and retaining possession of said stock of diamonds, watches and jewelry, was acting with said insolvent in the secreting, concealing and withholding said diamonds, watches and jewelry, for the purpose of defrauding said estate, and preventing the said property from coming into the hands of said intervener, and from being distributed among the creditors of said insolvent. That plaintiff was not, at the time of the taking by the defendant of said diamonds, watches, jewelry and fixtures, the owner of, or entitled to the possession of, the property described in his complaint or in his notice, and is not now the owner thereof, or entitled to the possession thereof." It was ordered "that judgment be entered herein in favor of the intervener for the possession of the property described in plaintiff's complaint, and in favor of defendant against plaintiff for his costs." Judgment was accordingly so entered, from which, and from an order denying his motion for a new trial, plaintiff appeals.

The findings above quoted are assailed by the appellant as not justified by the evidence, and numerous rulings of the court upon the admission of evidence are specified, and urged as errors in law which call for a reversal. The statement on motion for new trial, as found in the transcript, consists of about four hundred printed pages. To state the evidence intelligibly, and to review the rulings complained of, would require a very extended opinion, and, in view of the conclusion reached upon another point, we have deemed it unnecessary to attempt to do so. It is undoubtedly well-settled law that if two owners of goods or chattels of a similar character mix and intermingle them together in such a manner that they are not distinguishable, and if, under a writ of attachment or execution against one of the owners, all of the goods or chattels so mingled are taken by the sheriff as his property, the burden is upon the other owner to point out and

designate to the sheriff the particular goods or chattels which are his, and until he does so he cannot maintain an action against the officer to recover the portion which he claims: *Wellington v. Sedgwick*, 12 Cal. 469; *Wade on Attachments*, sec. 134. But this rule does not apply if the goods or chattels are plainly and easily distinguishable: *Queen v. Wernwag*, 97 N. C. 383, 2 S. E. 657. For example: If A had a band of sheep, and also horses or mules in the same pasture, and if with his consent B had been permitted to mix and intermingle his own sheep with A's, so that they were not distinguishable, and if then, under a writ of attachment against B, the sheriff should seize all the sheep and horses or mules as the property of the latter, there could be no pretense that the rule as to confusion of goods would have any application except as to the sheep. And in such a case, if A should bring an action against the sheriff to recover possession of all the property seized, he could not be defeated as to the horses or mules because he did not, before commencing suit, point out to the sheriff the particular sheep which were his. Here it appears that the plaintiff purchased at the assignee's sale and paid for a large stock of goods, consisting of a great variety of articles, and no question is made as to his title to all the goods so purchased. He afterward continued the business, and purchased and paid for other goods. At the time of the attachment the stock of goods in his store was of the value of \$20,000, as the court found. Of these goods many articles, as shown by the schedule—a large majority in number—were as distinguishable from diamonds, watches and jewelry as would be a horse from a sheep. For instance, there were showcases on counters, wall cases, mirrors, desks, tables, chairs and stools, clocks, opera and field glasses, silverware, table and tea spoons, knives and forks, a letterpress, a stepladder, a safe, gold-headed canes, a sack of gold coin containing \$840, etc. Now, conceding that, with the knowledge and consent of the plaintiff, and for the purpose stated, there had been brought into his store, and mingled with his goods of a like character, so that they could not be distinguished, diamonds, watches and jewelry which still belonged to the estate of the insolvent—a fact which plaintiff positively denied—still the sheriff was not authorized to seize all the other goods which were distinguishable, and in doing so he was clearly a trespasser. The notice to the sheriff was

sufficient to meet the requirements of sections 549, 689, of the Code of Civil Procedure, as amended in 1891. It stated that the plaintiff claimed and was the owner of all the property levied upon, "except a portion owned by Geo. L. Bannister," but that exception did not vitiate it. There is no question here as to the portion owned by Bannister. It follows that the court clearly erred in adjudging that the intervener, as assignee of the insolvent, was entitled to the possession of all the property described in the plaintiff's complaint; and the judgment and order appealed from should therefore be reversed and the cause remanded for a new trial.

We concur: Britt, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are reversed and the cause remanded for a new trial.

GAINSLEY v. GAINSLEY.

Sac. No. 67; March 24, 1896.

44 Pac. 456.

Trial.—Where the Statement of Facts Found is Distinctly Separate from the conclusions of law, though both are written on one piece of paper, there is a substantial compliance with Code of Civil Procedure, section 633, requiring that "the facts found and the conclusions of law must be separately stated."

Trial — Conclusions of Law.—Where the Judgment Fully Expresses the conclusions of law, and is attached to the statement of facts found, and is filed at the same time, there need not be an additional statement of the conclusions of law.¹

Continuance.—A Motion for a Continuance on the Ground of defendant's sickness was supported by a certificate signed "H. H. L." To the court's question as to who L. was, defendant's attorney answered that he did not know, and did not know whether L. was a physician or not. The motion was denied, and no exception was taken.

¹ Cited with approval in *Shurtliff v. Extension Ditch Co.*, 14 Idaho, 426, 94 Pac. 578, the court saying that under the Idaho statute the judge is not required to sign findings and conclusions (although it is customary) distinct from the judgment itself.

The trial proceeded, and defendant's attorney's subsequent offers to prove that L. was a regular physician were denied. No offer of competent evidence to prove defendant's sickness was made, and no delay was asked for the purpose of an examination of defendant by a physician. Held, that the motion was properly denied.

APPEAL from Superior Court, Sacramento County; A. P. Catlin, Judge.

Action by Seth Gainsley against Mamie E. Gainsley. Plaintiff had judgment and defendant appeals. Affirmed.

Hiram W. Johnson and Johnson & Johnson for appellant; Hinkson & Van Fleet for respondent.

VANCLIEF, C.—Action for divorce on the ground of adultery, in which the judgment was in favor of plaintiff. The defendant has appealed from the judgment and from an order denying her motion for a new trial.

The case was tried by the court without a jury and findings were not waived. The only written findings of fact are those prefixed to the judgment, as follows: "And the court, being fully advised in the premises, finds that the allegations of plaintiff's complaint and supplementary complaint are sustained by the testimony, and are true; and all and singular the law and the premises being by the court here fully understood and considered, wherefore it is ordered, adjudged and decreed that the marriage between the said plaintiff, Seth Gainsley, and the said defendant, Mamie E. Gainsley, be dissolved, and the same is hereby dissolved, and the said parties are, and each of them is, freed and absolutely released from the bonds of matrimony and all the obligations thereof. A. P. Catlin, Judge. Attest: W. B. Hamilton, Clerk, by E. F. Pfund, Deputy. [Seal.]" Indorsed: "Filed November 8, 1894. W. B. Hamilton, Clerk, by E. F. Pfund, Deputy."

1. No objection is made on the ground that the facts as found do not warrant the judgment, but it is contended for appellant that they are not stated separately from the conclusions of law. But I think the statement of facts found is as distinctly separate from the conclusions of law as if it had been written on a separate paper, and, in this respect, is in substantial compliance with section 633 of the Code of Civil Procedure. As to intermixture of law and facts in find-

ings, see *Millard v. Supreme Council*, 81 Cal. 340, 22 Pac. 864; *Burton v. Burton*, 79 Cal. 490, 21 Pac. 847.

2. It is further contended that there are no written conclusions of law distinct from the judgment itself, and that, for this reason, the judgment cannot stand. In this case the judgment fully expresses the conclusions of law, and, having been attached to the statement of facts found and filed at the same time, there was no necessity for any other statement of the conclusions of law. All that is required is that "the facts found and the conclusions of law must be separately stated" (Code Civ. Proc., sec. 633); although it is true that a statement of the conclusions of law generally precedes the rendition of a final judgment, in which case it is provided that the judgment must accord with the preceding conclusions of law; but, except in cases of this kind, I can imagine no reason why the conclusions of law should be twice stated in the same case. It is well settled that the findings of fact and conclusions of law constitute the "decision" of the court, but this does not preclude the inclusion of the conclusions of law in the judgment alone, in case the judgment is drawn and filed at the same time that the findings of fact are drawn and filed. In such case, an additional statement of the conclusions of law would be superfluous. In *Miller v. Hicken*, 92 Cal. 230, 28 Pac. 339, this court said: "It is objected that the court did not find, in terms, that the defendants and intervenor had not 'constructive' notice of plaintiff's mortgage; but that followed from the facts found, and it is immaterial that the court did not make an express 'conclusion of law' to that effect." Whether or not the judgment in that case was erroneous depended upon the effect of the recordation of the mortgage and an alleged discharge thereof, as constructive notice to defendants. If, therefore, constructive notice, effected by our registration laws, is a conclusion of law, as seems to have been correctly assumed in the above quotation, that case authorizes the views above expressed. And it seems to be well settled that constructive notice, which is imputed by law, is a conclusion of law and not a fact: *Birdsall v. Russell*, 29 N. Y. 249; *Drey v. Doyle*, 99 Mo. 459, 12 S. W. 287; *Jordan v. Pollock*, 14 Ga. 156; *Johnson v. Dooly*, 72 Ga. 299; 16 Am. & Eng. Ency. of Law, pp. 791, 792, and authorities there cited; *Anderson's Law Dictionary*; *Black's Law Dictionary*. What is here said is limited to notice expressly im-

puted by statute, as the case of *Miller v. Hicken*, supra, involved no other kind of notice.

3. There is nothing worthy of special consideration in the point that the findings of fact are not justified by the evidence, as the evidence strongly tended to prove all the material allegations of the complaint, and, as to the ground of divorce, much of it may be deemed direct.

4. It is contended that the court erred in denying defendant's motion for a continuance, on the ground that defendant was sick and unable to attend court, made, when the case was called for trial, upon the following certificate: "This is to certify that Mrs. M. E. Gainsley is suffering from nervous prostration, complicated with gastritis, and is not able to leave her room. H. H. Look." The motion was objected to on the ground that the showing of sickness was insufficient. Thereupon the court called attention to absence of any evidence that H. H. Look was a physician, and asked who he was, to which defendant's attorney answered that he did not know, and that he did not know whether Mr. Look was a physician or not. Thereupon the court denied the motion, and no exception was taken. The trial then proceeded, and, after the pleadings were read, defendant's attorney offered to prove that Mr. Look was a regular physician, but proffered no evidence, documentary or oral, and the court ordered the trial to proceed, to which order defendant's attorney excepted, and then asked the court for a delay of twenty minutes in which to procure evidence that Mr. Look was a regular practicing physician, and also to prove the illness of the defendant, and, this being denied, he again excepted. He then offered to prove, by a witness present, Henrietta Wohl, the sickness and inability of the defendant to attend the trial. This was denied, and he again excepted. After the examination of three witnesses for the plaintiff, defendant's attorney again asked the court to continue the case on the ground of the illness of defendant, but at this time offered no evidence of such illness. The court then took a recess until 1:30 o'clock P. M., at the expiration of which defendant's attorney offered to prove by Dr. Nichols that "Mr. Look was a regular practicing physician of standing and a member of the Medical Association of Sacramento," but the court declined to hear this testimony. After the examination of two witnesses for defendant, on motion of defendant, the further trial of the case was

postponed for three days, at the expiration of which the trial was renewed, and the defendant, being present, testified in her own behalf. I think it does not appear that the court exceeded its discretionary power in denying defendant's motion for a continuance. No competent evidence of the sickness or inability of the defendant was offered, nor was the denial of the motion in the first instance excepted to. On the renewal of the motion, after a recess of an hour and a half, and without leave of the court, defendant's attorney proposed to prove by Dr. Nichols that Mr. Look was a regular practicing physician, but not that defendant was sick. As it appeared that the defendant was then in the city of Sacramento, why, during the recess, was not the certificate of Dr. Nichols or that of some other physician procured? Was Dr. Look the only physician in the city who would certify or testify to the inability of defendant to attend the trial? No delay was asked for the purpose of an examination of the defendant by any physician. The court may well have suspected that the motion was not in good faith, from the circumstances that the certificate of H. H. Look, not purporting to be that of a physician, and who was not known to be such by defendant's attorney, was the only evidence of sickness offered before the motion was first denied, and thereafter every offer made tended to confirm such suspicion. I think the order and judgment should be affirmed.

We concur: Haynes, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order and judgment are affirmed.

I concur in the judgment: Temple, J.

SALISBURY v. BURR, Sheriff (PERKINS, Intervener).*

L. A. No. 79; March 24, 1896.

44 Pac. 461.

Insolvency—Fraudulent Transfers.—In *Replevin*, where defendant, as assignee of an insolvent debtor, alleges that the property was fraudulently transferred to plaintiff by the insolvent in order to de-

*For subsequent opinion in bank, see 114 Cal. 451, 46 Pac. 270.

feat his creditors, special findings that plaintiff knew the debtor was insolvent at the time of the transfer, and that the transfer was made to prevent the property from coming into the hands of the assignee, and from being distributed among the creditors with a view to defeat the object of the California insolvent act of 1880, plaintiff having reasonable cause so to believe, but that the transfer was not made to give preference to any creditor, are sufficient to support a general verdict for the defendant under act of April 16, 1880, section 55, relating to transfers by insolvent debtors.

APPEAL from Superior Court, Los Angeles County; Lucien Shaw, Judge.

This was an action in claim and delivery, brought by A. B. Salisbury against John Burr, as sheriff, to recover a stock of merchandise taken by the sheriff under a writ of attachment sued out by Gregory Perkins, Jr., assignee of F. E. Randall. Perkins intervened. There was a verdict and judgment for the intervener, and, a motion for new trial having been granted, intervener appeals. Reversed.

Graff & Latham for appellant; Walter Rose and W. H. Young for respondent.

SEARLS, C.—This is an appeal by the defendant and the intervener from an order of the court below granting a new trial on the motion of plaintiff. The action is in claim and delivery to recover by the plaintiff, A. B. Salisbury, a stock of groceries, trade fixtures, horses, wagons, harness, etc., alleged to be of the value of \$2,800. The defendant, John Burr, denied the ownership or possession of plaintiff, and justified the taking and detention of the property: (1) As the sheriff of the county of Los Angeles, under and by virtue of a writ of attachment sued out by Gregory Perkins, Jr., in an action instituted by said Perkins against F. E. Randall, who was indebted to said Perkins in the sum of \$370.98, which said writ was levied on the property March 5, 1895, as the property of said Randall. (2) Defendant justifies further by showing that on the day of the levy of the attachment, viz., March 5, 1895, said F. E. Randall filed his voluntary petition in insolvency, was adjudged an insolvent, and thereupon defendant was, by order of the court, duly appointed receiver of the estate of said insolvent, and on the seventh day of March, 1895, filed bond and qualified as such receiver, took

possession of the property, and still retains the same as such receiver. That said insolvent, within thirty days next before the filing his petition in insolvency, pretended to sell said property to plaintiff. That such sale was fraudulent, without consideration, and made to defraud creditors and to prevent the property from going to the receiver, etc., averring certain facts tending to show fraud on the part of plaintiff and said Randall. George Perkins, Jr., intervened in the action by leave of the court, and showed by his complaint that he had been duly elected, and had qualified as assignee in insolvency of the estate of the insolvent, F. E. Randall, and had received an assignment of said estate, executed by the clerk of Los Angeles county; and also averred that the property in question had been fraudulently transferred by the insolvent to plaintiff, without consideration, out of the usual course of business, and to prevent the property coming to the hands of the assignee, and from being distributed to the creditors of said insolvent, and to defeat the object of the insolvent act of 1880; that plaintiff was cognizant of the fraud, etc., and that the insolvent had no other property than that conveyed, etc. The cause was tried by a jury, a general verdict rendered in favor of intervener, and several special findings returned. These findings may be summarized as follows: Randall was insolvent at the time he transferred the property to plaintiff, which fact plaintiff had reasonable cause to believe. The transfer was made with intent to prevent its coming to the assignee in insolvency; to prevent its being distributed ratably among his creditors; and with a view to defeat the object of the insolvency act of 1880, which last fact plaintiff had reasonable cause to believe at the time of the transfer. The transfer was not made to give a preference to any creditor or person having a claim against the insolvent, or to anyone who was under liability to him, or to prevent the property which the insolvent received in exchange for the property transferred from coming to the hands of the assignee or from being ratably distributed; and, if the insolvent so intended, plaintiff had no knowledge thereof, or reason to so believe. There is a statement on appeal, but it does not set out any of the evidence, or the instructions given to the jury or refused by the court, and the question must turn upon the sufficiency of the specifications upon which the notice of motion for a new trial specified that it would be made "upon the minutes

and records of the court and upon the instructions of the court to the jury and the pleadings, records and findings in said action.”

Under the fourth subdivision of section 659 of the Code of Civil Procedure it was necessary for the moving party to specify in his notice of motion the particular errors upon which he would rely. The only specifications of error are as follows: (1) Insufficiency of the special findings to justify the verdict, and that the general verdict is against the law. (2) Errors in law occurring at the trial, and excepted to by plaintiff. (3) That the verdict is against the law. (4) That the general verdict rendered by the jury in the action is not supported by the special findings of fact made by the jury. (5) Upon the ground that the general verdict is inconsistent, and contrary to the special findings made by the jury. (6) That upon the special findings of fact it appears that the plaintiff is entitled to judgment against defendant and intervener for the return of the property. There is no suggestion that the evidence failed to support the verdict or special findings. We must therefore assume that it was sufficient in these respects. If there is any error assigned which the court below could consider, it must have been that the special findings were antagonistic to the general verdict, and did not support it. The general verdict in favor of intervener was the equivalent of a finding in his favor upon all the issues in the case. The special findings did not cover all of those issues, but, so far as they went, they were in harmony with such general verdict, and tended to its support. We fail to find in the record any ground upon which, by the most liberal construction, the act of the court below granting the new trial can be upheld. It is suggested—but whether rightly we cannot say—that the court regarded the cases of *Ohleyer v. Bunce*, 65 Cal. 544, 4 Pac. 549, and *Washburn v. Huntington*, 78 Cal. 573, 21 Pac. 305, which construed section 55 of the insolvent act of 1880, as being overruled by *Hass v. Whittier*, 87 Cal. 613, 25 Pac. 917, and in the same case in 97 Cal. 411, 32 Pac. 449. *Hass v. Whittier*, 87 Cal. 613, 25 Pac. 917, was a case in which the action was brought by the assignee of an insolvent to recover from a creditor of the insolvent the value of certain personal property transferred to such creditor. There was no allegation in the complaint or finding that the insolvent transferred the property to his creditor “with a view to give a preference

to any creditor or person having a claim against him," and on appeal this court reversed the judgment, for the want of such allegation and finding. In the case at bar the complaint in intervention shows that within thirty days next before filing his petition in insolvency the insolvent pretended to transfer the property in question to plaintiff; that the transfer was without consideration, "and such pretended transfer was made out of the usual course of business, with the full knowledge on the part of said Salisbury that said F. E. Randall was then insolvent; and the said pretended sale was entered into by and between said F. E. Randall and said Salisbury for the purpose of preventing said property from coming to this intervener as the assignee of said insolvent, to prevent the same from being ratably distributed among his creditors, and to defeat the object of the insolvent act of 1880; and at the time of said pretended transfer said F. E. Randall had no other property with which to pay his debts, or out of which the same could be satisfied; . . . that said A. B. Salisbury, for the purpose of defrauding said estate, is wrongfully claiming to be the owner thereof," etc. These allegations, while not as full and complete as they might have been, are deemed sufficient in the absence of a demurrer. *Hass v. Whittier* was here again (97 Cal. 411, 32 Pac. 449), and on the second appeal it was held, among other things, that where there is a transfer by an insolvent debtor to his creditor, not made in the usual and ordinary course of business, the transaction is presumed *prima facie* to be a preference not allowed by section 55 of the insolvent act; but that such presumption may be rebutted by showing that no preference was intended, and that the insolvent intended to treat all his creditors alike. In the present case there is no showing that the plaintiff was a creditor of Randall, the insolvent. Section 55 of the insolvent act of 1880 is aimed not only at cases where an insolvent debtor, in contemplation of insolvency, within one month before filing his petition in insolvency, causes his property to be seized, etc., with a view to giving a preference to a creditor or person having a claim against him, but also at all persons who receive assignments, transfers or conveyances of his property within the same period, having reasonable cause to believe that such person (the assignor) is insolvent, and that the transfer, assignment or conveyance "is made with a view to prevent his property from coming to his assignee in insol-

vency, or to prevent the same from being distributed ratably among his creditors," etc., in which cases the transfer is void, and the assignee in insolvency may recover the property or its value. We are satisfied that upon the specifications of errors as assigned in the notice of motion for a new trial no cause was assigned upon which a new trial could properly be granted, and hence we recommend that the order granting a new trial be reversed and the cause be remanded, directing the entry of judgment in favor of intervener.

We concur: Britt, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order granting a new trial is reversed and the cause remanded, directing the entry of judgment in favor of intervener.

THOMAS v. PACIFIC BEACH COMPANY.*

L. A. No. 111; April 1, 1896.

44 Pac. 475.

Limitation of Actions.—An Action by a Vendee Against the Vendor to recover the purchase price paid for land on failure of the vendor to convey as required by the written contract of sale is an action founded upon an instrument in writing, within Code of Civil Procedure, section 337, and must be brought within four years.

Limitation of Actions.—Where the Contract of Sale Requires a Conveyance by the vendor "on demand," the statute does not begin to run against an action by the vendee for breach thereof by the vendor until after demand by the vendee for a conveyance.

APPEAL from Superior Court, San Diego County; George Puterbaugh, Judge.

Action by R. A. Thomas against the Pacific Beach Company. From a judgment for plaintiff and from an order denying a new trial defendant appeals. Affirmed.

McDonald & McDonald for appellant; Mr. Hunsaker and Henry J. Stevens for respondent.

*For subsequent opinion in bank, see 115 Cal. 136, 46 Pac. 899.

SEARLS, C.—This is a special assumpsit upon a contract by which defendant agreed to convey certain land to the plaintiff. The first count of the complaint, which was filed September 24, 1894, avers, in substance, that on the twelfth day of December, 1887, in California, plaintiff and defendant entered into a written contract by the terms of which defendant agreed to sell to plaintiff lot 11 in block 358 of Pacific Beach for \$500, with interest on deferred payments at ten per cent per annum, payable \$167 at date of agreement, \$166 and interest June 12, 1888, and \$167 and interest December 12, 1888; and defendant further agreed that, “in consideration of plaintiff making such payments, to execute to him upon his demand a grant deed conveying to him the real property above described.” The complaint then avers the payment by plaintiff of the sums at the times specified therefor, except that the last payment was made before due, viz., October 10, 1888, and that a discount of five per cent was made on account of such sooner payment. Total amount paid, \$512.90. That in September, 1891, plaintiff demanded a deed, which defendant neglected and refused to execute. On the seventh day of October, 1893, plaintiff demanded of defendant the repayment of the sum of \$512.90 so paid, and offered to restore defendant everything of value received under the contract, which was refused by defendant. That plaintiff has been damaged in the sum of \$512.90 and interest from the respective times of payment. There are four other precisely similar counts or causes of action set out in the complaint, except that they arise on a precisely similar agreement to convey lots 12, 13, 14 and 15, in the same block of land. Defendant demurred to the complaint, averring in apt terms, among other things, that plaintiff’s causes of action were barred by the provisions of sections 337, 339, 343 of the Code of Civil Procedure. The demurrer was overruled, and thereupon defendant answered, setting up as a defense the bar of the causes of action by said several sections of the Code of Civil Procedure, as in the demurrer. Judgment was rendered in favor of plaintiff upon the said five several causes of action, as prayed for in the complaint, except that interest was allowed only from October 7, 1893, the date when plaintiff demanded repayment. Defendant appeals from the judgment and from an order denying its motion for a new trial.

The only point made on the appeal relates to the bar of the causes of action under the statute of limitations. We need not refer to the findings, for the reason that, while they are full and complete in favor of plaintiff upon the several pleas of the sections, respectively, of the statutes of limitations, the demurrer presents the whole question with equal clearness and perspicuity. The action, as before stated, is special assumpsit upon the written agreement. The contention of appellant is that this is not "an action upon any contract, obligation or liability founded upon an instrument in writing executed in this state," but is an action of implied assumpsit, upon the defendant's breach of its contract to convey, to recover the purchase money paid; and consequently subject to the bar of subdivision 1, section 339 of the Code of Civil Procedure; in other words, that the action was barred within two years after the cause of action arose. What we term an implied assumpsit arises in all that class of cases in which money is due from the defendant to the plaintiff *ex aequo et bono*, and it may be recovered in an action for money had and received. In the large class of cases in which an action for money had and received will lie, no express promise need be averred or proven under our system of practice; but upon proof of the facts showing the duty to devolve upon the defendant to make payment, the law raises the implied promise to pay. The action is most frequently resorted to in actions *ex contractu*, where no recovery could be had upon the contract actually made, as, for instance, where money has been paid upon contracts void under the statute of frauds, in cases of the rescission of the contract, cases of the payment of money under a mistake of fact, etc. But in the present instance the liability of the defendant is founded upon the instrument in writing pleaded in the complaint, viz., the contract to convey the lots of land. The obligation of defendant is founded directly upon a breach of that contract, not remotely or ultimately, as in *Chipman v. Morrill*, 20 Cal. 131, but immediately, as a necessary sequence of the violation of the contract to convey, upon which plaintiff had paid his money. When defendant, upon payment by plaintiff of the purchase price, refused to convey the land as provided for in its contract, it was guilty of a breach of that contract, for which an action would lie in favor of plaintiff, either for a specific performance of the contract to convey, or

in damages for the refusal. In the latter case plaintiff was entitled to recover as damages, under section 3306 of the Civil Code, the price paid, and interest thereon, together with his expenses properly incurred in examining the title, etc. Plaintiff counts upon the violation of the contract, and seeks to recover the price paid and interest. If this is not an action upon a contract, obligation or liability founded upon an instrument in writing, etc., within the purview of section 337 of the Code of Civil Procedure, it would be difficult to name one that is. It follows that plaintiff had, under that section, four years within which to bring the action after the breach occurred.

2. When did plaintiff's cause of action accrue? In an ordinary agreement to convey land upon payment of the purchase price the obligation of the vendor to convey arises upon the payment by the vendee of the agreed price, and no demand of a conveyance is necessary: *Chatfield v. Williams*, 85 Cal. 518, 24 Pac. 839; *Camp v. Morse*, 5 Denio (N. Y.), 164. In such a case the statute of limitations begins to run from the date when the vendee was entitled to bring his action, viz., the date of the final payment. But that is not this case. The parties had a right to make such contract as they saw fit. They might have provided that a deed should have been executed and delivered thirty days, or at any other specified time, either before or after the final payment was made. What they did in fact agree upon in writing was, as is averred in the complaint, not denied by the answer, and found by the court, as follows: "And defendant further agreed, in consideration of plaintiff making such payments, to execute to him, upon his demand, a grant deed conveying to him the real property above described." Under this agreement a demand was a condition precedent to the duty of defendant to convey, and until it was made plaintiff's right of action was not complete: *Bolles v. Stearns*, 11 Cush. (Mass.) 320; *Gould*, Pl., c. 4, sec. 15; *Rice v. Churchill*, 2 Denio (N. Y.), 145. Under the wording of the contract the agreement to convey was not a dependent one, but an independent covenant that in consideration of payment defendant would thereafter, when demand was made, convey the property. The demand for a conveyance was made upon defendant in September, 1891. This demand set the statute of limitations in motion from that date, and as the action was commenced within four years next

thereafter, it was not barred. The judgment and order appealed from should be affirmed.

We concur: Vancilief, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

O'CONOR v. CLARKE et al.*

L. A. No. 11; April 2, 1896.

44 Pac. 482.

Bills and Notes—Indorsement Before Delivery.—A person writing his name on a bill before maturity, to enable the drawer to whose order it was drawn to negotiate the same, is liable as an indorser.¹

Bills and Notes—Indorsement Before Delivery.—A bill drawn payable to the drawer's order, and indorsed by him in blank, before maturity, is transferable by delivery merely.

Bills and Notes.—An Indorsee of a Note Takes the Same Subject only to such defenses as would have been good against his indorser.

Trial.—A Finding That All the Allegations in the Complaint not specifically found on are true, and the allegations in defendant's answer not specifically found on are untrue, does not require a reversal, where it appears that specific findings, on the allegations not directly found upon, would have necessarily been adverse to appellant.

New Trial—Newly Discovered Evidence.—The Refusal of a new trial on the ground of newly discovered evidence will only be reversed for abuse of discretion.

APPEAL from Superior Court, San Diego County; George Puterbaugh, Judge.

Action by Andrew J. O'Connor, receiver of the Consolidated National Bank of San Diego, against W. H. Clarke and others. From a judgment for plaintiff, defendant Frank A. Kimball appeals. Affirmed.

*Rehearing denied.

¹ Cited in *Navajo Co. Bank v. Dolson*, 163 Cal. 489, 126 Pac. 155, where the court say that the law of California in no way relieves a holder of the necessity of giving to an indorser before maturity notice of nonpayment.

Works & Works for appellant; Jas. E. Wadham for respondent.

PER CURIAM.—This is an action upon a bill of exchange, and the material facts of the case are as follows: On August 12, 1890, Livingston, Clarke & Co. drew the said bill of exchange on the Pacific Hardware Company, payable to their own order ninety days after date; and on the twenty-seventh day of that month the same was accepted by the drawee, "payable at office Sather Banking Company, San Francisco, Calif." Thereafter, and before the maturity thereof, the defendants W. H. Clarke, Frank A. Kimball, Sidney Selover, and J. B. Livingston indorsed the said bill of exchange, to enable the drawers to negotiate the same and obtain money thereon; and thereupon Livingston, Clarke & Co. indorsed the said bill, and sold, assigned and transferred the same to the Sather Banking Company. On November 8, 1890, the indorsers, Clarke, Kimball, Selover and Livingston, by an instrument in writing, signed by them, waived demand, protest and notice of protest of and upon the said bill of exchange; and thereafter in January, 1891, the same was for value sold, assigned and delivered by the Sather Banking Company to the Consolidated National Bank of San Diego, which has ever since been the owner and holder thereof. Interest on the said bill of exchange was paid by the Pacific Hardware Company up to March 10, 1893, but no other payments of principal or interest have ever been made. On November 16, 1893, the plaintiff, as duly appointed and qualified receiver of the Consolidated National Bank, commenced this action against the drawers, drawee and four indorsers of the said bill of exchange, to recover the principal and interest still due and unpaid on the same. All of the defendants were duly served with summons, but only the defendant Kimball appeared to contest the plaintiff's right to recover. He demurred to the complaint, and, his demurrer being overruled, answered, setting up several separate defenses to the action. At the commencement of the trial, the plaintiff moved the court to dismiss the action as to the defendants Livingston, Clarke & Co., and as to Livingston and Clarke individually; and the motion was granted, against the objection of defendant Kimball. And, at the conclusion of the trial, the court found upon all the issues raised in favor of the plaintiff, and gave judgment

against the defendants the Pacific Hardware Company, Sidney Selover and Frank A. Kimball, for the full amount due on the said bill of exchange. From this judgment and an order denying his motion for a new trial the defendant Kimball appeals.

1. The demurrer to the complaint was properly overruled. The pleading stated facts sufficient to constitute a cause of action, and there was no uncertainty in any of the particulars pointed out which would authorize a reversal.

2. We see no material error in any of the rulings complained of. The appellant wrote his name on the back of the instrument before its maturity, and before it was sold and delivered to the Sather Banking Company, to enable the drawers to negotiate it and obtain money thereon. He was therefore an indorser, and liable as such: Civ. Code, secs. 3108, 3117; *Fisk v. Miller*, 63 Cal. 367. The payees indorsed the instrument in blank before maturity, and transferred it to the banking company for value. It was thereafter payable to bearer, and transferable by mere delivery.

Counsel sought to prove that appellant had been released from his obligation as an indorser for various reasons, but none of the offered and rejected evidence would have affected that result. It is sufficient, therefore, to say, without detailing the evidence, that it was irrelevant and immaterial, and was properly excluded.

3. The court found that there was no change made in the terms of the said draft, and that there was no contract, understanding, agreement or intention to change or alter the same. This finding is assailed as not justified by the evidence. But there was evidence—and it would seem a preponderance of it—clearly tending to support the finding; and the judgment cannot therefore be reversed on this ground.

4. Following the specific findings, there is a general finding to the effect that all allegations in the complaint "not specially found on are true," and all allegations in defendant's answer "not specially found on are untrue." This finding is also assailed as "a sort of blanket finding," and not justified by the evidence. It is urged that one of the allegations of the complaint is that appellant indorsed the bill "for a valuable consideration"; that this allegation is denied by the answer; and that the plaintiff offered no evidence in support of it. But the court had already found that appellant in-

dorsed the bill before maturity, and to enable Livingston, Clarke & Co. to negotiate it. The correctness of this finding is not questioned, and, if the indorsement was made as stated, it imposed a binding obligation, and no further evidence as to the consideration therefor was necessary.

It is further urged that defendant alleged in his answer that he signed the paper at the solicitation of the drawers thereof, and upon their representation that the draft would be paid out of the proceeds of the sale of the cargo of mahogany mentioned in the instrument, and that he proved the allegation, and plaintiff offered no evidence on the subject. Conceding this to be so, still the facts alleged, if found to be true, would constitute no defense as against the plaintiff. The Sather Banking Company purchased the draft in good faith and for value before maturity, and it therefore took it free from all equities and defenses which may have existed between the original parties to it. And the Consolidated National Bank took the same title that its transferor had, and subject only to such defenses as would have been good against the transferor.

The finding complained of, though a "blanket finding," must be sustained, the rule being that "where the findings made dispose of the issues sufficiently to support the judgment, and make it clear that, if more specific findings had been made, they must necessarily have been adverse to appellant, the judgment cannot be reversed for failure to find specifically upon each issue": *Hulsman v. Todd*, 96 Cal. 288, 31 Pac. 39.

5. One of the grounds on which the motion for new trial was made was newly discovered evidence. In support of the motion, counsel for appellant read certain affidavits; but all the material facts stated in them were squarely contradicted by counter-affidavits read for respondent. The granting of a new trial upon the ground of newly discovered evidence is a matter which rests largely in the discretion of the trial court, and its exercise will not be disturbed on appeal except in case of abuse clearly shown by the record: *O'Rourke v. Vennekohl*, 104 Cal. 254, 37 Pac. 930; *Harralson v. Barrett*, 99 Cal. 607, 34 Pac. 342; *People v. Urquidas*, 96 Cal. 239, 31 Pac. 52. In this case no abuse of discretion which would justify a reversal is shown.

It follows that the judgment and order appealed from must be affirmed, and it is so ordered.

ELLIS v. TULARE COUNTY.*

Sac. No. 70; April 7, 1896.

44 Pac. 575.

Counties—Supervisors as Road Commissioners—Compensation. By Political Code, sections 2641, 2645, as amended by Statutes of 1893, page 113, county supervisors are made ex-officio road commissioners in their respective districts, and their compensation for such services is therein fixed, "when not otherwise provided by law." By the county government act (Stats. 1891, p. 295, sec. 173, subsec. 15), the compensation of supervisors in counties of the eleventh class is fixed at six dollars per day for actual service, and certain mileage; and section 216 provides that the salaries and fees provided in the act shall be in full compensation for all services rendered, either as officers or ex-officio officers. Held, that the compensation of supervisors in counties of the eleventh class, while acting as road commissioners, is provided for by the county government act, and fixed at six dollars per day, and is therefore not affected by the provisions of code, section 2645.¹

APPEAL from Superior Court, Tulare County; Justin Jacobs, Judge.

Action by John G. Ellis against Tulare county. Judgment for plaintiff and defendant appeals. Affirmed.

F. B. Howard for appellant; Lamberson & Middlecoff for respondent.

BELCHER, C.—During the year 1894, John G. Ellis, the plaintiff, was a supervisor and ex-officio road commissioner for supervisor district No. 5 in Tulare county. As such road commissioner, he performed services in his district for payment of which he, in January, 1895, presented a claim to the board of supervisors of the county for allowance. The claim was properly itemized and verified, and was for one hundred and seventeen days' services, at six dollars per day. The

*Rehearing denied.

¹ Cited and followed in *White v. Hayden*, 126 Cal. 623, 59 Pac. 119, where it is held that a member of a board of county supervisors who renders, ex officio, services as road commissioner, under the statute, is entitled to have the auditor issue to him his warrant for the compensation, and that a corresponding duty is on the auditor.

board rejected the claim, and thereupon he commenced this action to recover the sum of \$702, alleged to be due him for the services so rendered. The case was tried by the court, upon a stipulation as to the facts; and on June 25, 1895, the court rendered its decision, and ordered judgment in favor of the plaintiff for the amount claimed. Judgment was accordingly so entered, and from it the defendant appeals, without any statement or bill of exceptions.

In 1894, Tulare county was a county of the eleventh class, and the only question is, Was the plaintiff, under the law as it then stood, entitled to the compensation demanded for his services as road commissioner? Prior to 1891 the Political Code contained the following provisions: Section 2641 declared that "each supervisor shall be ex-officio road commissioner of the several road districts in his supervisor district, . . . provided that no member of the board of supervisors shall receive any compensation for any services whatever performed by him, or required of him, under any of the provisions of this chapter, other than his salary or per diem and mileage as a supervisor." Section 2642 provided for the election or appointment in the several counties of the state of road overseers; and section 2645 prescribed the duties of road overseers, and the compensation to be paid for their services. In 1891 these sections were amended by an act of the legislature which was passed March 31st, and took effect on the Monday after the first day of January, 1893: Stats. 1891, p. 474. As amended, section 2641 omits the clause as to compensation. Section 2642 abolishes the office of road overseer; and section 2645 imposes upon the road commissioner the duties which had been performed by the road overseer, and provides that, "when not otherwise provided by law, he shall receive for his services as such road commissioner twenty cents per mile one way for all distances actually traveled by him in the performance of his duties, provided that he shall not in any one year receive more than three hundred dollars." In 1893 sections 2641 and 2645 were again amended by an act of the legislature, which was passed March 9th, and took effect from and after its passage: Stats. 1893, p. 113. These amendments consisted chiefly in the transfer from the last to the first named section of the provision as to compensation. On March 31, 1891, a county government act was passed, which took effect from and after its passage, "except as pro-

hibited by the constitution," and was in force during the year 1894: Stats. 1891, p. 295. The act contained the following provisions: Section 173: "In counties of the eleventh class the county officers shall receive, as compensation for the services required of them by law or by virtue of their office, the following salaries, to wit: . . . (15) Supervisors, each six dollars per day for actual service, and forty cents per mile while traveling from his place of residence to the county seat: provided, that no more than one mileage in any one monthly term shall be allowed." Section 216: "The salaries and fees provided in this act shall be in full compensation for all services of every kind and description rendered by the officers therein named, either as officers or ex-officio officers, their deputies and assistants, unless in this act otherwise provided." By this act the counties of the state were divided into fifty-three classes, and as to each class it was provided that "the county officers shall receive, as compensation for the services required of them by law or by virtue of their office, the following salaries, to wit." As to a few of the classes special provision was made for the compensation of the supervisors as such and as road commissioners. For example, the provision as to the fourth class was: "Supervisors, twelve hundred dollars each per annum, and five hundred dollars per annum as road commissioners." In the provision, however, as to most of the classes, no special mention was made of "road commissioners"; but the supervisors were allowed in some cases a gross sum, and in others a per diem and mileage.

It is contended for appellant that, as no special provision was made for the compensation of road commissioners in counties of the eleventh class, the plaintiff was not entitled to recover for his services as such commissioner the per diem allowed supervisors, and that his right to recover was limited to the mileage provided for by section 2645 of the Political Code, as amended in 1891, and by section 2641, as amended in 1893. This contention cannot, in our opinion, be sustained. The plaintiff was a supervisor of the county, and there is no denial that the services for which he seeks to recover were actually performed by him as road commissioner. This being so, it must be assumed that the services were "required of him by law or by virtue of his office," and that he was entitled to the compensation which the statute provided a supervisor should receive in such case.

It is not necessary to consider the other questions discussed by counsel. The judgment should be affirmed.

We concur: Haynes, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

TULARE IRRIGATION DIST. v. KAWEAH CANAL & IRRIGATION CO.

Sac. No. 66; April 7, 1896.

44 Pac. 662.

Corporation—Purchasing Its Own Stock.—The purchase by a corporation of a part of its own stock, until it is reissued, in effect reduces its stock to that extent.

Corporation—Sale of All Its Property.—The sale by a corporation of all its property and franchises, except its corporate franchise, does not carry with it shares of its own stock, which it had bought in for delinquent assessments, and had not authorized to be reissued.¹

APPEAL from Superior Court, Tulare County; W. W. Cross, Judge.

Action by the Tulare irrigation district against the Kaweah Canal and Irrigation Company. Judgment for defendant and plaintiff appeals. Affirmed.

J. W. Davis for appellant; Bradley & Farnsworth and Pringle, Hayne & Boyd for respondent.

HAYNES, C.—This cause was tried by the court, and findings and judgment were for the defendant; and the plaintiff appeals from the judgment and an order denying its motion for a new trial.

The plaintiff is a corporation, organized under the act of the legislature known as the "Wright act," for the purpose of supplying water for irrigating the lands within the district so organized. The defendant is a corporation organized

¹ Cited in the note in 103 Am. St. Rep. 570, on the sale by a corporation of all its assets.

under the general statute, and owned certain water rights, dams, canals, ditches, real estate, etc., from which the Tulare irrigation district could be supplied with water for the purposes for which it was organized. Under these circumstances plaintiff and defendant entered into an agreement whereby the defendant sold and conveyed said property to the plaintiff in consideration of the sum of \$150,000, payable in the bonds of the plaintiff at par. The deed executed by the defendant to the plaintiff, after describing certain lands, water rights, canals, etc., as to which there is no controversy, concluded the description of property and rights conveyed, as follows: "Also all right, title, and interest of the first party (the defendant) in and to all dams, headgates, and drops used or maintained in connection with the ditch or ditches of the first party, or any of them; also all tools, scrapers, plows, implements, and personal property of the first party, except its office furniture, books, and papers; also all franchises, rights, and privileges now owned or enjoyed by the first party, except its corporate franchise to exist and transact business as a corporation in accordance with its articles of incorporation."

Prior to this sale the defendant purchased thirty-five shares of stock in its own corporation, at a sale thereof for a delinquent assessment, and which stock had been transferred to the defendant corporation upon its books, and had not been re-issued. Twenty-five thousand dollars of the bonds received from the plaintiff were applied in part to the payment of an indebtedness to an individual, and in part as a commission for negotiating the sale. Another portion of the bonds was set aside to meet other liabilities of the defendant, and the remainder of the bonds were distributed to its stockholders as a dividend, the amount of the dividend being \$200 per share. This action was brought by the plaintiff to compel the delivery to it of said thirty-five shares of stock in the defendant corporation, and to recover the dividend thereon of \$200 per share, payable in the bonds received from the plaintiff, together with the interest paid by the plaintiff thereon, claiming that said stock was personal property belonging to the defendant at the time of the sale, which was not excepted therefrom, and which, by the sale, passed to it under the general clause of the conveyance above quoted.

The judgment for the defendant was right. Stock in a corporation of the character of the defendant represents an interest in the property of the corporation, and is evidence that the lawful holder is the owner of an interest in the property of the corporation in the proportion that his shares bear to the whole number of shares issued and held by the stockholders. The legal title to the property represented by the stock is vested in the corporation for the benefit of the stockholders. When these thirty-five shares were bought by the corporation for the unpaid assessment, the amount so paid was charged up as a liability, to be met by the remaining stockholders, and the remaining stock represented the entire property of the corporation. The thirty-five shares could not be liable for assessments, nor participate in dividends, nor be voted at elections. These shares were dormant, and could only be resuscitated by selling them and placing the selling price in the treasury for the benefit of the stockholders: *Robinson v. Mining Co.*, 72 Cal. 32, 13 Pac. 65. But, conceding that the defendant corporation could have sold these shares, it would require corporate action to authorize it, either by the stockholders or by the directors, and we see no evidence of any intention to do so; and appellant's contention, if carried to its practical result, demonstrates that it could not have been within the intention of either party.

Suppose the property which the defendant concedes was sold, conveyed and delivered to the plaintiff was of the actual value of \$150,000, no more and no less. If all the stock of the defendant corporation had been in the hands of individual stockholders, the plaintiff would have acquired no stock, but would have property the exact equivalent in value of the money or bonds paid. If we now suppose that, at the time of the purchase, one-half of the stock of the defendant corporation was in its treasury, having been purchased, as these thirty-five shares were, at sales for delinquent assessments, it would follow, upon plaintiff's theory, that, though it got, under its purchase, \$150,000 worth of other property, it would also have acquired one-half its stock, and would be entitled to participate in a dividend of \$200 per share, to be paid out of the identical bonds they paid for the property, thus getting back into plaintiff's treasury one-half of the purchase price paid, as well as property of the value of \$150,000. In other words, they would practically get defend-

ant's entire property and one-half its stock for \$75,000, or one-half of that which it agreed to pay, and did in fact pay, while the individual stockholders, whose stock alone, at the time of the sale, represented all the property of the corporation, whether in the treasury or out of it, would realize from the sale but half its value. We find no evidence in the record which indicates that such a result was contemplated or intended by either party during their negotiations, nor does the language used in the conveyance permit such construction. "If a corporation has power to reduce its capital stock, it has been held it may do so by purchasing and retiring a portion of its shares": Cook on Stock and Stockholders, sec. 282. But whether the defendant had power to permanently reduce its stock or not, the effect of the purchase was to reduce its stock temporarily and until it should be regularly reissued. So long as it remains in the treasury, it represents no part of or interest in the property of the corporation. It was as though it had never been issued; and in *Brewster v. Hartley*, 37 Cal. 15, 30, 99 Am. Dec. 237, it was said: "The capital stock of a corporation, previous to its being issued, cannot, in any proper sense, be called the property of the corporation." And that is true as to the stock in question here. It is true that "the language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity": Civ. Code, sec. 1638. The appellant's contention, carried to its logical result, would involve an absurdity, inasmuch as its effect would be to return to it \$7,000 of the money paid, with the right to participate in any future dividends that might be declared by the defendant.

It is also contended that defendant ratified the sale. The ratification of the sale is clear, but the ratification did not extend to anything not included in the conveyance, and therefore did not reach the stock. Appellant discusses several rulings of the court upon questions of evidence, but these alleged errors were not specified in its statement on motion for a new trial. However, we have examined them, but find therein no ground for a reversal. These questions went to the point whether during the negotiations any mention was made of these shares. Upon the face of the agreement and conveyance, we are obliged to hold that the stock in question did not pass, and the appellant, therefore, could not be prejudiced by evidence that no mention was made of it during the nego-

tiations resulting in the sale. The judgment and order appealed from should be affirmed.

We concur: Vanelief, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

TULARE BUILDING & LOAN ASSN. v. COLEMAN et al.

Sac. No. 75; April 28, 1896.

44 Pac. 793.

Mortgages—Foreclosure—Pleading—Dilatory Practice.—In foreclosure, after a demurrer to the petition had been overruled, defendants were granted fifteen days to answer, and on their motion were given five days more. They filed an answer May 2, 1895, which plaintiff moved to strike out because unverified. Defendants confessed the motion, and asked leave to file an amended answer, purporting to have been verified April 3, 1895, by a defendant who claimed no interest in the premises. There was no showing why the verified answer, which stated no defense, was not filed in the first instance, it being an exact copy of the other. Held, that the court did not err in denying leave to file the amended answer.

APPEAL from Superior Court, Tulare County; William W. Cross, Judge.

Action by the Tulare Building and Loan Association against Harry E. Coleman and others, in foreclosure. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Lamberson & Middlecoff for appellants; Davis & Allen for respondent.

VANCLIEF, C.—Action to foreclose a mortgage executed by the defendant Henry E. Coleman, to secure his promissory note for the sum of \$2,000, and interest at eight per cent per annum, payable to the plaintiff (a corporation) eight years after date, but provided that, if default be made in the payment of any part of said interest as it became due and payable, then the principal and interest should immediately become due at the option of the holder, and that such option might be exercised without notice. The complaint was duly

verified. On March 18, 1895, the defendants appeared, and filed a general demurrer to the complaint. The demurrer was overruled on April 12, 1895, and defendants were allowed fifteen days to answer. On April 27, 1895, the court, on motion of defendants, granted five days' additional time in which to answer. On May 2, 1895, the defendants served and filed an unverified answer. Thereafter, on due notice, plaintiff's attorneys moved the court to strike out the answer, on the ground that it was not verified. Thereupon defendants' attorneys consented to the striking out of the answer, and at the same time produced and asked leave to file what they denominated an "amended answer," which purported to have been verified by the defendant Witkowski, on April 3, 1895, twenty-four days prior to the filing of the unverified answer. The so-called "amended answer" was an exact copy of the unverified answer which had been filed, except that the word "amended" was added thereto. The court ordered the unverified answer to be struck out, but denied leave to file the proffered amended answer, on the ground of inexcusable negligence on the part of defendants, there being no showing nor pretense of any excuse for not having filed the verified answer, instead of the other, in the first instance. After hearing evidence for plaintiff, the court gave judgment in its favor, from which the defendants bring this appeal on a bill of exceptions, and contend that the court erred in denying their motion for leave to file the so-called "amended answer."

For the following reasons, I think the court did not exceed a proper exercise of its discretionary power in denying the motion:

1. By what the court was justified in regarding as mere dilatory tactics, the defendants had secured a delay of a month and a half.

2. The proffered amended answer appears to have been verified in San Francisco on April 3, 1895, and there is no pretense that it might not have been filed long before the unverified answer was filed; and that it was not so filed, instead of the latter, is evidence of a degree of negligence indicating bad faith.

3. Witkowski, who verified the answer, was made a party defendant, on the ground that he had or claimed some interest or claim upon the mortgaged premises; but in the answer he makes no claim of any interest in or lien upon the prem-

ises, and no reason appears why the answer was not verified by an interested party.

4. The proffered verified answer does not deny the execution of the note or mortgage, nor that defendant had failed to pay the interest, installments and fines, as alleged in the complaint, but alleges as an affirmative defense that plaintiff had agreed with defendants to collect certain rent to become due to them "upon property situated in the city of Tulare, California, and to credit the amount of said rents" upon the interest and installments as they became due; but that plaintiff "neglected and failed to collect said rents, and neglected to apply any of the same" as per agreement; that, at all times after making said agreement, "defendants were out of said county of Tulare, and at a great distance from the city of Tulare," and were not notified by plaintiff that it had neglected to collect and apply said rents; and "that, by reason of said plaintiff's neglect to perform its contract herein mentioned, these defendants have been damaged in the sum of \$231.07"; and that defendant Coleman "is entitled to have said amount of \$231.07 offset against any claim of said plaintiff against him for any fines and interest that plaintiff may be entitled to charge upon said sum of \$92.03 of installments and interest, as aforesaid."

The leased property from which rents were to be collected by plaintiff is not described except as above; nor are any lessees named; nor is it alleged that the lessees were either able or willing to pay rent, nor that Coleman had not collected the rent before the commencement of this action; nor is it alleged where or how far distant from the city of Tulare the defendants were during the time the rent should have been collected, nor even that they did not have notice during their absence that the rents were not paid. It is not claimed that the judgment is for a greater amount than was due and unpaid according to the terms and legal effect of the note and mortgage. Therefore, besides the inexcusable negligence, it is too plain to admit of argument that the proffered answer stated no defense, and that the court did not err in denying leave to file it. It follows that the judgment should be affirmed.

We concur: Belcher, C.; Britt, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

KENNEDY v. CONROY.

Sac. No. 58; April 28, 1896.

44 Pac. 795.

Sale—Change of Possession.—A Stepfather Delivered to his stepson, who had been living with him on his ranch, a lease thereof, reserving two rooms in the house thereon for himself, and at the same time gave him, for value, a bill of sale of sheep and hogs running on the ranch. The lease was never recorded, and they continued to live together on the ranch without any change in their relations or in the possession being manifest to the world. Held, that the bill of sale was void, under Civil Code, section 3440, declaring all sales of personal property void as to creditors where there is not actual and continued change of possession.

Contract—Consideration.—Cancellation of a Pre-existing Debt is a valuable consideration.

Fraudulent Conveyance.—A Preference of Creditors by an insolvent is valid.

APPEAL from Superior Court, Placer County; J. E. Prewett, Judge.

Action by James P. Kennedy against W. C. Conroy. From a judgment for defendant and an order denying a new trial plaintiff appeals. Affirmed.

John M. Fulweiler and F. P. Tuttle for appellant; B. F. Myres and Ben. P. Tabor for respondent.

VANCLIEF, C.—This is an action to recover damages for the conversion by defendant of certain sheep and hogs alleged to be the property of the plaintiff. The defendant justifies the taking of the property upon the ground that he was sheriff of the county of Placer, and as such seized and sold the property under an execution against C. Quinn, whose property he alleged it was at the time of such seizure. On the twelfth day of August, 1893, Quinn executed and delivered to plaintiff a lease demising to him a farm in Placer county for the term of two years and two months, and on the same day made and delivered to plaintiff a bill of sale of livestock and other personal property then on said farm, including

the sheep and hogs in question. The consideration named in the bill of sale is \$2,600, and the testimony tends to show that Quinn was indebted to plaintiff at the time the bill of sale was executed (though in what amount does not appear), and that the cancellation of the pre-existing debt was the consideration for the sale. These instruments were executed and delivered to plaintiff at the town of Lincoln, and plaintiff (who is the stepson of Quinn) testified: "When I received this bill of sale, Mr. Quinn turned the stock over to me on the ranch in the presence of witnesses. He turned the stock over to me on the ranch. The witnesses were Cornelius Kennedy and Owen Corcoran. No, it was not on the ranch that he turned the stock over to me; it was in the town of Lincoln. The stock was not in Lincoln, but that is where the witnesses were when they witnessed it. They witnessed the bill of sale. No, it was not witnessed by them. They were witnesses to the stock. Statements were made in their presence by him to me in Lincoln." In the lease of the farm Quinn reserved from its operation two rooms in the farm-house for the use and occupation of himself and his wife as a home and residence, and Quinn was there when the defendant seized the animals. There is nothing in the record to show how many rooms there were in the house, nor whether the rooms so reserved by Quinn were the same rooms that he and his wife had previously occupied. The lease was not recorded. Plaintiff was twenty-six years old, had lived with Quinn since his boyhood, and worked on the farm, having charge of the sheep and hogs, which were on the place before the execution of the bill of sale. After the making of the bill of sale, plaintiff had charge in the same way. The hogs and sheep remained on the ranch in the same condition that they had been in before he took the bill of sale. There was no change in the manner of using or keeping them. One witness testified that he went to work on the Quinn ranch about the 24th of August, 1893, and worked there two months; that he was employed by plaintiff, who paid him for his work. Another witness testified that he had seen the hogs and sheep on the ranch of Mr. Quinn; that plaintiff was working on the ranch prior to August 1, 1893, and shortly after that, on the ranch, witness heard Quinn say that he delivered and sold all this stock to plaintiff; that plaintiff seemed to be in charge; that Mr. Quinn was not doing anything at all, except little chores

around home. On the twenty-third day of November, 1893, the defendant levied upon the property. On the twenty-eighth day of November, 1893, the plaintiff served a notice upon defendant that the property levied upon was his property, forbidding defendant to sell it, and demanding its immediate return. But said notice was not verified by the oath of the claimant, or any other person, nor did it state the matters pertaining to the right of possession or grounds of title required by section 689 of the Code of Civil Procedure, as amended March 2, 1891. It was admitted that the defendant was, on the twenty-second day of November, 1893, and thence hitherto continued to be, the duly elected, qualified and acting sheriff of the county of Placer. The court below rendered judgment in favor of the defendant and denied plaintiff's motion for a new trial. The appeal is from the judgment and from the order denying the motion for a new trial.

Appellant contends that there was an actual change of possession from Quinn to appellant on the twelfth day of August, 1893, which continued until the property was taken by the respondent, in November, 1893, and cites a number of California cases in support of such contention. But a careful reading of those cases discloses the fact that in each of them there are some circumstances which in a marked manner differentiate it from the case in hand. Thus, in *Montgomery v. Hunt*, 5 Cal. 366, from which appellant quotes in his points and authorities, the court said: "The cattle remaining on the ranch followed the actual possession of it by Meacham, and were no longer in the possession of Weston." The presence of Meacham on the ranch was sufficient to put the world upon notice of the changed condition of affairs respecting the cattle. In this case Quinn remained on the farm after the bill of sale was executed, and there was no change in the conditions apparent. The rule laid down in *Stevens v. Irwin*, 15 Cal. 503, and ever since adhered to in this state, requires that the change of possession shall be so manifest "as to give evidence to the world of the claims of the new owner." The court below held that the sale to appellant was void, under section 3440 of the Civil Code, for want of the necessary change of possession; and I am satisfied that such conclusion was warranted by the evidence: See *Woods v. Bugbey*, 29 Cal. 467; *Regli v. McClure*, 47 Cal. 612; *Gray v. Corey*,

46 Cal. 211; Grum v. Barney, 55 Cal. 254; Merrill v. Hurlburt, 63 Cal. 494; Bell v. McClellan, 67 Cal. 283, 7 Pac. 699; Ruddle v. Givens, 76 Cal. 457, 18 Pac. 421; Bunting v. Saltz, 84 Cal. 170, 24 Pac. 167; Pearce v. Boggs, 99 Cal. 340, 33 Pac. 906; Howe v. Johnson, 107 Cal. 67, 40 Pac. 42. It may be conceded that the consideration for the sale was sufficient. The cancellation of a pre-existing debt has been held to be a valuable consideration: Schluter v. Harvey, 65 Cal. 158, 3 Pac. 659. So, too, it has been held that a debtor, though insolvent, may make a payment to a creditor which will have the effect of defeating the collection of other debts against him: Ross v. Sedgwick, 69 Cal. 250, 10 Pac. 400; Dana v. Stanfords, 10 Cal. 278. But, although the transaction between Quinn and appellant may have been entirely honest, with a view to the payment of Quinn's debt, and without the intention of hindering or defrauding creditors of Quinn, yet, if the transaction falls within the inhibition of section 3440 of the Civil Code, it must be governed by it. As was said in Woods v. Bugbey, 29 Cal. 479: "If in fact there was not an actual and continued change of possession given, the statute pronounces the transfer fraudulent as to creditors, and the courts have no right to seek to evade its force and effect. No excuse or explanation for want of an actual and continued change of possession can be entertained." Some exceptions were taken at the trial to the rejection and admission of evidence, but I think the court did not err in any of its rulings. I think the order and judgment should be affirmed.

We concur: Belcher, C.; Britt, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order and judgment are affirmed.

EASTERBROOK v. CITY AND COUNTY OF SAN FRANCISCO.

S. F. No. 187; May 1, 1896.

44 Pac. 800.

Special Assessments — Payment Under Protest — Recovery.— Political Code, section 3819 (Laws 1893, p. 32), authorizing actions against counties to recover taxes paid under protest, does not apply to special assessments levied by the city and county of San Francisco, for a specific purpose, in a designated district, to be collected in proportion to benefits, and, when collected, placed in a special fund, over which the city and county have no control, and which can only be used in payment of the principal and interest of bonds for which the city and county are not liable.¹

APPEAL from Superior Court, City and County of San Francisco; James M. Seawell, Judge.

Action by D. E. Easterbrook against the city and county of San Francisco to recover back money paid under protest for special assessments levied for the widening of Dupont street, in the city of San Francisco. From a judgment in favor of defendant, on refusal of plaintiff to plead further after demurrer to the complaint was sustained, plaintiff appeals. Affirmed.

Haven & Haven for appellant; H. T. Creswell, W. C. Belcher and Freeman & Bates for respondent.

SEARLS, C.—This is an action brought by the appellant to recover from the respondent money paid under protest for Dupont street taxes, levied under authority of the act of March 23, 1876, entitled "An act to authorize the widening of Dupont street, in the city of San Francisco" (Stats.

¹ Cited in *Davis v. City and County of San Francisco*, 115 Cal. 68, 46 Pac. 863, as having been decided after the taking of an appeal and the filing of briefs in the latter case, which follows its doctrine.

Cited and followed in *Phelan v. City and County of San Francisco*, 120 Cal. 4, 52 Pac. 39, where it is held that a warning to the tax collector, at the time of payment, not to turn over the money to the treasurer, in view of a contemplated suit to test the question of validity, must be disregarded.

1875-76, p. 433). A demurrer was interposed to the complaint by defendant, which was sustained by the court; and, plaintiff declining to amend, judgment was entered in favor of defendant, from which judgment plaintiff appeals. The cause comes up on the judgment-roll, and the sufficiency of the complaint constitutes the sole question for consideration.

The action is prosecuted under section 3819 of the Political Code, adopted February 27, 1893, which is in part as follows: "At any time after the duplicate assessment-book has been received by the tax collector, and the taxes have become payable, the owner of any property assessed therein, who may claim that the assessment is void in whole or in part, may pay the same to the tax collector under protest, which protest shall be in writing, and shall specify whether the whole assessment is claimed to be void, or if a part only, what portion, and in either case the grounds upon which such claim is founded; and when so paid under protest the payment shall in no case be regarded as a voluntary payment, and such owner may at any time within six months after such payment bring an action against the county in the superior court to recover back the tax so paid under protest," etc. The residue of the section provides that if a judgment be recovered against the county in such a case, and a portion of the tax has been paid over to the state treasury, the treasurer shall be allowed therefor, and the amount so paid over deducted in the next settlement of the county treasurer with the controller, as provided in section 3871 of the Political Code.

Plaintiff filed a written protest, averring that the entire tax was void; and, within six months after paying the tax, brought this action, to recover the tax so paid from the city and county. The question in the court below seems to have turned, not upon the validity of the tax, but upon the liability of the defendant, if the invalidity be conceded. The statute under which the tax was levied provided for the widening of Dupont street (now Grant avenue), in the city and county of San Francisco. The act provided that the value of the land taken for the widening of the street, and the damages to improvements thereon, or adjacent thereto, injured thereby, and all expenses whatsoever incident to the widening of said street, shall be held to be the cost of widening the street, and shall be assessed upon a described and limited district

adjacent to the street to be benefited by such widening. The mayor of the city and county of San Francisco, the auditor and county surveyor of said city and county, and their successors in office, were constituted a "Board of Dupont Street Commissioners," with power, among other things, to determine the damages sustained by the several owners on account of property taken and damaged; also, to determine the benefits to be derived by the several lot owners within the district described in the statute, by reason of the improvement, "relatively to the benefits accruing to other lots of land within the said designated district." The expenses were to be met by issuing twenty year coupon interest-bearing bonds of the city and county of San Francisco (interest, seven per cent per annum, etc.), to be designated as the "Dupont Street Bonds," to be delivered to the persons in whose favor damages were awarded; or, upon their refusal to accept such bonds, they were to be sold, and cash payments made to the persons so damaged. The liability of the city and county was guarded against by section 22 of the act, as follows: "The completion of the work described in this act shall be deemed an absolute acceptance by the owners of all lands affected by this act, and by their successors in interest, of the lien created by this act, upon the several lots so affected, and it shall operate as an absolute waiver of all claim in the future upon the city and county of San Francisco for any part of the debt created by the bonds authorized to be issued by this act, and their successors in interest. This shall be regarded as a contract between said owners and the holders of said bonds and said city and county, and this provision shall be stated on the face of the bonds." These bonds and the accruing interest thereon were to be met by the levy of an annual tax upon the lands in the designated district, to be adjusted and distributed according to the enhanced values of the respective parcels of land as fixed by the commissioners. The taxes, when collected, were to be paid over to the treasurer of the city and county, and to "constitute a part of the 'Dupont Street Fund,' and to be paid out by said treasurer only in payment of the coupons attached to said bonds, as the same from time to time become due"; and the sums collected to meet the principal were to be received, treated and paid out in like manner.

From these brief references to the statute, it is apparent (1) that what is termed the "tax" is a special assessment, levied for a specific purpose, upon a designated district, to be collected in proportion to benefits; (2) that, when collected, it is placed in a special fund, and can only be used in payment of the principal and interest of the bonds provided for in the statute; (3) that the city and county is not liable for the payment of the bonds, and has no control over the specific fund raised for their liquidation. Under these circumstances, we do not see that the city and county can be held liable in this action. The case is, we think, brought within the spirit of the rule enunciated by the United States circuit court in *Liebman v. City and County of San Francisco*, 11 Saw. 147, 24 Fed. 705, and in *Elberg v. San Luis Obispo Co.* (decided by department 2 of this court, August 3, 1895), 112 Cal. 316, 41 Pac. 475, 44 Pac. 572, and *Pacific Mut. Life Ins. Co. v. San Diego Co.* (decided August 21, 1895), 112 Cal. 314, 41 Pac. 423, 44 Pac. 571. A rehearing was granted in the last two cases above mentioned; and, after mature consideration by the court in bank, the conclusion reached by the department has been approved. We recommend that the judgment appealed from be affirmed.

We concur: Britt, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

MYERS v. NELSON et al.*

Sac. No. 31; May 1, 1896.

44 Pac. 801.

Highways—Obstruction of Culvert.—Where owners of land adjacent to a highway construct a system of artificial ditches, converging at a culvert crossing such highway, so as to discharge an unnatural quantity of water on the lower lands on the opposite side of such highway, the owner of such lower lands cannot dam the culvert on the highway for the purpose of protecting her lands from such overflow.

*Rehearing denied.

APPEAL from Superior Court, Butte County; John C. Gray, Judge.

Action by Elizabeth Myers against J. M. Nelson and J. C. Richardson to enjoin defendants, who are, respectively, road supervisor and his employee, from digging up and removing earth which plaintiff had placed across a culvert crossing a highway, for the purpose of preventing the flow of water through such culvert on her land, in which a preliminary injunction was allowed. From an order dissolving such injunction plaintiff appeals. Affirmed.

W. H. Carlin and M. E. Sanborn for appellant; H. V. Beardon for respondents.

BRITT, C.—Defendant Nelson is a member of the board of supervisors of Butte county and ex-officio road commissioner in and for his supervisor district. Under the direction of said board, it is his duty to take charge of the highways in his district, keep them clear from obstructions and in good repair, and employ the help necessary for that purpose: Pol. Code, secs. 2641, 2645. Defendant Richardson is employed by Nelson in caring for the highways of the district, and it is admitted that in the matters laid to their charge here they acted officially, and under the instructions of the board of supervisors. There is a highway under the superintendency of said Nelson running from east to west along the line between sections 10 and 15 of a certain congressional township, which highway has existed as such for more than five years, regularly laid out and constructed by order of said board. It occupies a strip of land four rods in width along the boundary between said sections, two rods in each section, it seems; and the roadway or traveled portion thereof has been graded and elevated about eighteen inches above the surface of the surrounding soil, this being necessary to its use during the rainy season. Such elevation was effected by taking the earth from either side of the roadway, and within said strip four rods wide, leaving upon each side of the roadway a depression or gutter lower than the adjacent surfaces. The country for some miles around slopes gently from northeast to southwest. At the lowest point on said section line is a culvert through and under said roadway for

the purpose of carrying off surface water accumulating in the highway. The bottom of such culvert was on a level with the bottom of the gutters on the sides of the roadway, and we may infer that the result of this arrangement was to allow any water accumulating on the north side of the roadway to flow through the culvert to the south side thereof, where, if not further obstructed, it would find its way to the somewhat lower land to the south in section 15. This land—four hundred and eighty acres in area—is the property of plaintiff, but the right of way for said highway along the said northern boundary of the same was granted by her predecessors in interest to said county. The surface of the land of plaintiff, and also that of several sections lying north and northeasterly therefrom, is marked with low ridges and shallow depressions or “sinks,” which cause the natural drainage of the same to be “slow, gradual and incomplete.” Within a period of five years next before the commencement of the action (which was November 26, 1894), divers persons, owners and occupants of said lands lying north and northeasterly of plaintiff’s, have from time to time constructed ditches, “with many lateral connections, and with a slight and even fall of grade in a general southerly and westerly course,” converging to a point on said section 10 near the north end of said culvert. The effect of such system of ditches, as claimed by plaintiff, is to collect the surface water from the land, and discharge it in unnatural volume and greatly accelerated flow at said point of convergence; and none of it, she alleges, would reach that point naturally, or at all, except by such system of artificial ditches. In order, it seems, to prevent the passage of the water brought down by means of such ditches through said culvert and upon her land, plaintiff entered upon the highway at the north end of the culvert, and, by means of earth, filled in the gutter on the north side of the roadway to a level with the surrounding soil, so that the water which would naturally flow in said gutter accumulates and overflows the roadway, and travel thereon is impeded. The defendants, for the “protection, benefit and maintenance of said public highway,” were about to dig up and remove the earth with which plaintiff had caused such gutter and culvert to be obstructed as aforesaid, when plaintiff brought this action to enjoin them from so doing, claiming that the effect of their intended acts would be to cause all of the waters carried

through said system of ditches to be precipitated upon her land, and flood the same, to her irreparable injury. A preliminary injunction was allowed, which, on motion of defendants, heard upon the complaint and answer, was dissolved by the court. The order of dissolution is the subject of the present appeal.

Upon the papers before it, the court might fairly have found the facts to be as we have stated; and we think they warranted its action dissolving the injunction. Plaintiff invokes the doctrine, which we have no inclination to deny, that highway officers may not collect in artificial channels mere surface water precipitated by rain over large districts, and throw it upon the property of another (*Conniff v. San Francisco*, 67 Cal. 49, 7 Pac. 41; *Gould on Waters*, secs. 261, 272); but here the plaintiff does not claim that either the gutters along the sides of the highway or the culvert have the effect to collect surface water in its natural flow in such manner as to occasion any injury to her. On the contrary, it clearly appears from her complaint that the surface water from the lands above her own would not reach said culvert in any harmful quantity but for the system of artificial ditches constructed for the more rapid drainage of their lands by her neighbors. Defendants are not shown to be in any way responsible for the ditch system which, in point of time, followed the construction of the highway. To restrain the water brought down "through the medium of said system of artificial ditches" (the phrase of the complaint) from reaching her land, plaintiff claims, virtually, that she may use the roadway as a dam, closing up the inlet to the culvert to make the stoppage effectual, to the impairment of the highway and hindrance of public travel. If a herd of cattle had been unlawfully turned loose, so that, by traversing the highway, they might enter on her land, we suppose that she would have no right to impound them in the road, or to enjoin the road commissioner from removing structures she might erect there for that purpose, and that the responsibility for the damage the cattle might do would be upon the persons who set them at large, and not upon the roadmaster. The case put seems not much different from the case at bar. "If the owner of the upper ground wrongfully direct an unnatural quantity of water upon the ground of a lower neighbor, by collecting several streams together, and discharging them at one place,

or by any other means, the neighbor below may have an action against him; but he cannot justify the erection of an embankment to stop the water if thereby the water is improperly forced upon another owner": *Martin v. Riddle*, 26 Pa. 415, 417. See, also, *Mathews v. Kinsell*, 41 Cal. 512; *Amick v. Tharp*, 13 Gratt. 564, 67 Am. Dec. 787. The order appealed from should be affirmed.

We concur: Searls, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order appealed from is affirmed.

SUTTON v. NICOLAISEN et al.

Sac. No. 56; May 1, 1896.

44 Pac. 805.

Highways—What Constitute—User.—Occasional Travel on a road across government land, which has never been laid out, recorded or worked as a public road, will not constitute it a highway.

Highways—Establishing by User—Repeal of Statute.—The provision of Political Code, 1876, section 2619, as originally enacted, that "all roads used as such for a period of five years are highways," was repealed by act of March 30, 1874, as to all counties, though the amendment was in terms made applicable to certain counties only.

APPEAL from Superior Court, Placer County; J. E. Prewett, Judge.

Action by Richard T. Sutton against Christian Nicolaisen and others. Judgment for plaintiff and defendants appeal. Affirmed.

Ben P. Tabor for appellants; A. K. Robinson for respondent.

BELCHER, C.—The plaintiff brought this action to recover damages for trespasses committed by defendants by entering on his land, and tearing down about thirty feet of his boundary line fence, and digging up the soil, and destroying the grass and vegetation growing thereon, and also to obtain an

injunction restraining defendants from repeating the said trespasses, and from constructing, as they threatened to do, an open road through and across plaintiff's said land. The defendants, by their answer, denied that they had committed, or threatened to commit, any trespasses upon the land of the plaintiff, or that he had been damaged in any sum whatever; and they alleged that for more than thirty years there had been a public highway, forty feet wide, the line of which was specifically described, over and across the land of plaintiff, which had been continuously used by the traveling public during all of said time; that defendants were residents and taxpayers in the county in which the road is situated, and were accustomed to pass on foot and with vehicles over the same to their postoffice and market place; "that on or about the third day of April, 1894, said open traveled way was, by some person, obstructed by a wire fence constructed across the same, and by trees felled across the boulders rolled into said road or way, totally preventing the defendants from traversing the same; that defendants carefully, and with as little injury as possible, removed said obstructions from said road or way; and that said acts are and constitute the pretended trespass complained of by plaintiff." The case was tried without a jury, and the court found that all the averments of the complaint, except as to the amount of damages sustained, were true, and that all the denials and averments in the answer were untrue; that plaintiff had been damaged by the wrongful and unlawful acts of defendants in the sum of \$20; "that said defendants, if not restrained, will do plaintiff irreparable injury, and plaintiff has no adequate remedy at law"; "that the land described in defendants' answer is not a public highway"; and "that the defendants, or either of them, have no interest, easements, or right of way therein." Judgment was accordingly entered, awarding the plaintiff damages in the sum of \$20 and a perpetual injunction, as prayed for. From this judgment and an order denying their motion for a new trial the defendants appeal. In support of the appeal, it is earnestly contended that the findings were not justified by the evidence and that the judgment should therefore be reversed.

The principal question involved in the case and presented for decision is: Was or was not the strip of land described in the answer shown by the evidence to be a public highway? It was proved that respondent settled upon his land in 1881,

and obtained a United States patent therefor in December, 1893. In behalf of appellants it was proved that one of their number laid out a road over the said strip of land in 1874, and that he and a few other persons occasionally used it thereafter, up to near the time of the alleged trespass, for hauling wood, lumber, and some other freights, for driving livestock, and for passing over it on foot and in vehicles. It does not appear that any road across respondent's land was ever laid out and recorded as a highway; and, in rebuttal, it was proved that the alleged road was only from seven to nine feet wide, and that the roadmasters of the district in which it is situated had never done any work upon it as a public road. To sustain their theory that the road was a public highway, counsel for appellants rely upon section 2477 of the United States Revised Statutes, and upon section 2619 of the Political Code, as it was originally enacted. The first section above named provides: "The right of way for the construction of highways over the public lands, not reserved for public use, is hereby granted." This section simply grants a right of way for roads, but the question whether a road has been so constructed as to make it a public highway is one that can be solved only by a consideration of the laws of the state. The second section above named provided: "Roads laid out and recorded as highways by order of the board of supervisors, and all roads used as such for a period of five years, are highways." This section was amended by an act passed March 30, 1874, by striking out the words "and all roads used as such for a period of five years"; and, as thus amended, it remained in force until 1883, when the whole chapter upon the subject was repealed. It was provided, however, by the amendatory act, that it should apply only to certain named counties, of which Placer county, in which the road in question is situated, was not one. In *Gloster v. Wade*, 78 Cal. 407, 21 Pac. 6, the question was raised whether the said amendatory act had the effect to repeal the amended section of the code as to counties to which the act was not declared applicable. It was held that it did not have that effect, but that, as to all counties not named, the section as originally enacted remained in full force, notwithstanding the amendment. In *Huffman v. Hall*, 102 Cal. 26, 36 Pac. 417, in which the same question was again raised, a different conclusion was reached, and *Gloster v. Wade* was expressly overruled. And in *Cooper v. Monterey*

Co., 104 Cal. 437, 38 Pac. 106, the decision in the Huffman case was approved and followed. Counsel for appellants contend that the decision in Gloster v. Wade was a correct exposition of the law, and should be upheld, and that the two later decisions to the contrary should be overruled. This contention cannot be sustained. It appears that the question involved was very fully considered and ably discussed in the opinion rendered in the Huffman case, and that the decision was by the court in bank, five justices concurring. It also appears that the decision in the Cooper case was made by department 1 of the court, and that a rehearing in bank was asked for and denied. These decisions must therefore be accepted as the well-considered and latest expressions of the views of the court upon the question in hand, and as correct expositions of the law upon the subject. It follows that the court below was justified in finding that the strip of land described in the answer was not a public highway, and that the judgment and order appealed from should be affirmed.

We concur: Searls, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

KENDALL v. EARL et al.

No. 18,392; May 4, 1896.

44 Pac. 791.

Agency—Ratification—Neglect to Disavow Agent's Acts.—Plaintiff consigned goods to defendants, with instructions not to sell below a certain price without first advising him. Defendants sold at a price lower than that named and without consulting plaintiff, but notified him immediately after the sale. Plaintiff was absent from home when defendants' letter arrived, but, after his return, made no objection to the sale, until several months had elapsed. Held, that plaintiff's failure to disavow defendants' acts immediately on the learning of the facts of the sale was a ratification precluding recovery of damages therefor.¹

¹ Cited and followed in *Allen v. McAllister*, 39 Wash. 446, 81 Pac. 929, holding in effect that if a factor is negligent or sells contrary to instructions, his act must be regarded as ratified unless dissatisfaction is expressed within a reasonable time.

APPEAL from Superior Court, Sacramento County; Matt F. Johnson, Judge.

Action by William S. Kendall against Joseph Earl and others to recover damages for breach of contract. There was judgment for defendants and plaintiff appealed. Affirmed.

Johnson, Johnson & Johnson and A. M. Johnson for appellant; C. H. Oatman for respondents.

HAYNES, C.—Plaintiff resides at Sacramento, and grows fruit in that county. The defendants are commission merchants doing business at Chicago, Illinois. On October 9, 1889, plaintiff shipped to defendants 22,758 pounds of dried French prunes, and 3,937 pounds of soft-shell almonds, under the terms stated in the following contract:

“Sacramento, Cal., October 9, 1889.

“Earl Bros. Co., Chicago, Illinois.

“Gentlemen: I shipped you per S. P. and U. P. R. R., in C. P. car 1282, 22,980 lbs. dried French prunes, and 4,000 lbs. of soft-shell almonds, to be sold by you on commission, at 4 per cent. to you. On said consignment I have received an advance, per check of George Dietrich, of \$1,200.00, on which advance you are to charge me interest, after thirty days, at 7 per cent. per annum. This consignment you are not to sell, unless at the following prices: For the prunes, 9 cts.; for the almonds, 14½ cts. per pound,—without advising me of the offers made for these goods at figures below those named, and I instruct you to accept a less sum than the figures named above, after receiving such advice from you.

“W. S. KENDALL.

“This is correct, and we agree thereto.

“MILTON BROWN.”

Milton Brown was an agent of defendants, and no question is made to the validity of the contract. In November, 1889, the defendants sold the prunes for six and one-half cents per pound, and the almonds at eleven cents, without communicating with the plaintiff, making a difference against the plaintiff of \$678.47, to recover which sum plaintiff brought this suit. A jury trial was waived, and the court made the following finding: “That all the facts alleged in the complaint are true, but that, after the sales by the defendants

of the prunes and almonds as alleged in the complaint, the plaintiff ratified, approved and confirmed the acts of the defendants in making such sales." Judgment was entered for the defendants, and this appeal is from an order denying plaintiff's motion for a new trial, and the only question is whether the evidence is sufficient to justify the finding that plaintiff ratified the sale made by defendants. There is no appeal from the judgment.

The sale of the almonds, with the price at which they were sold, was reported by the defendants to the plaintiff by letter dated at Chicago, November 15, 1889; and the sale of the prunes was in like manner reported, under date of November 25, 1889. The almonds were sold November 14th, and the prunes November 21st, and the prices at which they were sold were the market prices at the dates of sale. The evidence tended to show that from the time these sales were made the market remained about the same, or at least with slight fluctuations, until in March, when there was a slight improvement; but as to whether, in that month, the prices named in the contract could have been realized, the evidence was materially conflicting. Several other shipments were made by plaintiff to defendants of prunes and other fruits, and almonds, upon which defendants also made advancements. As before stated, defendants informed plaintiff of the sale of the almonds by letter dated November 15th, and of the sale of the prunes by letter dated November 25th. On November 28th the receipt of both of said letters was acknowledged by plaintiff's clerk, in which defendants were informed that Mr. Kendall was out of town, and would reply more fully in person, when press of business would allow, as no one else understood it. The plaintiff testified that at the time these letters were received he was at Los Angeles, "and was gone a good while"; that he did not remember what time he came back; that he was in Pasadena on Christmas day, and returned some time between that and January 2, 1890, and on that day wrote the defendants, without any mention of the defendants' letters received in his absence, as follows:

"If you can dispose of my prunes held by you at 7½ cts. per pound, or over, please do so. Your markets seem to range a trifle higher, but I had rather let them go. So, if

you can do so at the figures named, close out the entire lot, and make returns at once, and oblige

"Yours,

"W. S. KENDALL."

On March 8th defendants sent plaintiff an account of sales, and a check for \$1,856.69, and on March 17th plaintiff replied thereto; and in that letter he made the first reference to the sale of the prunes and almonds mentioned in the contract of October 9th, and made an account of the loss thereon, amounting to \$706.74, and demanded payment thereof. Concerning his delay in protesting against the sales in violation of the contract under which the said prunes and almonds were shipped, the plaintiff testified that, when he returned and learned of defendants' letters of November 15th and 25th, he saw Mr. Brown, and asked him how the defendants came to sell the goods in violation of the contract, and told him he thought it was not right; that Brown said he could not understand it, and he did not think it was right, and that he "would notify the defendants of the matter—would communicate with them about it." He further testified that he had at that time six or seven thousand dollars' worth of his goods in defendants' hands, "and was not in a position to raise a row about it." On the part of the defendants, the evidence was to the effect that the goods in question were sold, at the time they were sold, by an oversight, in not noting upon the books that they were to be held. Mr. Earl, one of the defendants, and who testified that he was more familiar with the facts than any of the other members of the firm, testified that he had no recollection of receiving, through Mr. Brown, any notice that plaintiff objected to the sale, or that he would hold defendants responsible. It does not appear that Mr. Brown had any other connection with the defendants than an agency to solicit consignments, nor is there any evidence tending to show that he did communicate to defendants the fact of plaintiff's dissatisfaction, other than the following reference in defendants' letter of March 27, 1890, in reply to plaintiff's demand for the payment of said difference, viz.: "At the time the almonds were sold, our Mr. Brown saw you in Sacramento, and, we believe, showed you the letter he had received from us, and you did not say anything to him then, only that you did not think we ought to have sold them; but otherwise you made no claim at all, and we thought you were

reasonably well satisfied, or you would have said more to Mr. Brown about it at the time."

In applying the principle of ratification to the unauthorized acts of an agent, a distinction is made between those cases where third persons may be injured by the delay of the principal to disavow the unauthorized act, and those cases where only the principal and agent are affected by the transaction. Where innocent third persons are, or may be, injured, reasonable promptness in repudiating the transaction, after full knowledge of the facts, is more imperative; and the same rule applies where the principal, with like knowledge, receives a direct benefit from the unauthorized act of his agent. So, too, the character of the transaction—whether it be of a mercantile character, or an isolated transaction, not affected by the usages of trade—has been considered, in determining what is a "reasonable time" within which the transaction must be disavowed. Story, in his work on Agency (section 258), says: "In respect to silence, whether it operates as presumptive proof of ratification may essentially depend upon the particular relations between the parties, and the habits of business and the usages of trade. In the ordinary course of business between merchants and their correspondents, it is understood to be the duty of the one party receiving a letter from the other to answer the same within a reasonable time; and, if he does not, it is presumed that he admits the propriety of the acts of his correspondent, and confirms and adopts them. This presumption seems now, in favor of commerce, to be universally acted upon. And, therefore, if the principal, having received information, by a letter from his agent, of his acts touching the business of his principal, does not, within a reasonable time, express his dissent to his agent, he is deemed to approve his acts, and his silence amounts to a ratification of them. Nor is this principle peculiar to our jurisprudence. It has received the sanction of the Roman law, and has also been fully recognized by modern commercial jurists on the continent of Europe." To the same effect, see Wharton on Agency, sec. 86. In *Ralphs v. Hensler*, 97 Cal. 303, 32 Pac. 243, quoting from *Ward v. Williams*, 26 Ill. 447, 79 Am. Dec. 385, the court said: "In general, where an agent is authorized to do an act, and he transcends his authority, it is the duty of the principal to repudiate the act as soon as he is fully informed of what has been thus

done in his name; . . . else he will be bound by the act, as having ratified it by implication": See, also, *Searing v. Butler*, 69 Ill. 575; *Prince v. Clark*, 1 Barn. & C. 186, 8 E. C. L. 80, and *Gold Min. Co. v. National Bank*, 96 U. S. 640, 644, 24 L. Ed. 648. Appellant cites sections 964 and 965 of *Pomeroy's Equity Jurisprudence*. The learned author there treats, in the first of these sections, of express confirmation or ratification, and, in the latter, of "acquiescence and lapse of time"; but he is treating the subject very broadly, and in relation to equitable actions of a widely different character, as shown by the two California citations in note 1, page 1404, viz., *Borland v. Thornton*, 12 Cal. 440, and *Phelps v. Peabody*, 7 Cal. 50, both of which were actions to enjoin the collection of judgments. Nevertheless, the principles laid down in the latter section, on page 1404, in no wise conflict with the authorities above cited. Appellant also cites *Whittemore v. Hamilton*, 51 Conn. 153, in which the court, referring to the section we have cited from *Story on Agency*, say: "But we think it must be understood that the principle was intended to apply only to those cases where the alleged principal receives a direct benefit from the act of the alleged agent, or where the latter appears to have been prejudiced by the neglect of the former to give him notice of dissent." The case there was very different, and did not involve the relations or principles involved in this case. There, *Hamilton* released a mortgage owned by *Whittemore* (and which was assigned to *Hamilton* as collateral security), to enable the mortgagor to complete a building upon the mortgaged premises, *Hamilton* relying upon his verbal promise to execute a new mortgage for the same amount as soon as the building should be completed. The mortgagor failed, and the promised mortgage was never executed. The court, immediately following the passage above quoted from the opinion, stated the true ground of the decision as follows: "If one holding property pledged to secure a debt should destroy it, or convert it to his own use, or give it away to another, whereby it becomes lost to the owner, does he ratify the act by mere neglect to give notice to the wrongdoer of his dissent? As well might the principle be applied to a trespass or any other tort."

It is also urged by appellant that defendants did not render an account of sales until March 8th, and that he made his formal claim for the deficiency on the 17th. He was, however,

notified of the sales, and the prices received, in November, and must have known that he was credited with the proceeds. He had received an advance of \$1,200 upon the prunes and almonds in question, upon which he was to be charged interest, after thirty days, at seven per centum per annum, and upon another shipment, made November 7th, he had received an advancement of \$3,000. Whether the plaintiff received any other payments prior to March does not appear, but he must have known that defendants would retain at least the \$1,200 advanced, and thereby interest would be stopped thereon, and this fact furnishes an additional reason why he should have promptly disavowed the sale. The reason given by plaintiff for not expressing dissent earlier, viz., that he had \$6,000 or \$7,000 worth of his goods in their hands, and that he was in no position to make complaint, is not sufficient to excuse the delay, but is suggestive of a purpose or intention to delay the expression of any disavowal of the unauthorized sales. The order denying a new trial should be affirmed.

We concur: Vanclef, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order appealed from is affirmed.

SPOONER v. CADY.*

Sac. No. 36; May 8, 1896.

44 Pac. 1018.

Attachment—Exemplary Damages Against Sheriff on Dissolution.—Where a sheriff, in attaching property, was not guilty of any oppression, fraud or malice, within the meaning of Civil Code, section 3294, but acted fairly in all respects, and simply performed the duties required of him as a public officer, exemplary damages will not be allowed against him on dissolution of the attachment.

Trover—Damages—Costs and Counsel Fees.—Where the only evidence of money properly expended in the pursuit of personal property which has been wrongfully converted (made a measure of damages under Civil Code, section 3336) is that plaintiff made a note for a gross sum to an attorney, in full payment of all expenses of

*Rehearing denied.

the proposed suit, from its commencement to its determination, and it does not appear what, if any, expenses were incurred, except that at the end of the controversy plaintiff had judgment for her costs, the money paid by plaintiff to her attorney cannot be properly taken into account, in estimating her damages.¹

APPEAL from Superior Court, Lassen County; W. T. Masten, Judge.

Action by Clara Spooner against Frank P. Cady for conversion of personal property. From a judgment in favor of plaintiff and from an order denying his motion for a new trial defendant appeals. Judgment modified, and order affirmed.

Goodwin & Goodwin for appellant; Shinn & Shinn for respondent.

BELCHER, C.—It is alleged in the complaint in this case that on the twenty-eighth day of September, 1892, plaintiff was the owner, in possession, and entitled to the possession, of certain described personal property, which was and is of the value of \$13,000; that on said day the defendant wrongfully, and without her consent, took said property from the possession of plaintiff; that on the third day of October, 1892, plaintiff demanded of defendant the possession of said property, but to deliver possession thereof to plaintiff defendant refused, and still refuses, to her damage, etc.; "that, by reason of said taking and detention of said property by defendant, plaintiff has been compelled to properly and necessarily expend a large amount of time and money in pursuit of said property; and that a fair compensation for the time and money so properly expended by plaintiff in pursuit of said property is the sum of three thousand dollars." Wherefore, judgment is asked (1) for a return of the property, or, in case a return thereof cannot be had, for the sum of \$13,000, the value thereof; (2) for the sum of \$3,000, as compensation for

¹ Cited and followed in *Hays v. Windsor*, 130 Cal. 236, 62 Pac. 397, where a judgment for the defendant in a replevin suit was modified by cutting out an item for counsel fees improperly included.

Cited in *Black v. Hilliker*, 130 Cal. 193, 62 Pac. 482, a replevin case, where it was said that the rule has been strictly followed that the allowance of counsel fees should not be carried beyond the exceptional cases to which the decisions have confined it.

the time and money properly expended by plaintiff in pursuit of said property; (3) for costs of suit. The original complaint was filed October 3, 1892. The answer denies that on the day named, or at any other time, the plaintiff was the owner, or in possession, or entitled to the possession, of the property described in the complaint, or of any portion thereof, and denies that she had properly or otherwise expended any money or time in the pursuit of said property; and it alleges that defendant was the duly elected, qualified and acting sheriff of Lassen county, and that as such officer he took into his possession the said property as the property of M. E. Spooner (the husband of plaintiff), to whom it then belonged, under and by virtue of two writs of attachment which were regularly issued out of the superior court of Placer county in actions commenced therein against said M. E. Spooner, and which were placed in his hands for service. And in a supplemented answer, subsequently filed, it is alleged that in October, 1892, the said writs of attachment were discharged, and that on November 15th, following, by order of court, all of said property was delivered by defendant to the plaintiff. The case came on regularly for trial before a jury on August 30, 1894, and evidence as to the plaintiff's ownership and possession of the property at the time of its attachment was introduced on both sides. It was proved that the property—consisting mostly of livestock—was situated on a ranch in Lassen county, which was claimed by plaintiff, and known as the "Spooner Ranch," and that it remained there after the attachment as before, and that while there, in his custody, defendant paid plaintiff, for the pasturage of the stock, the agreed rental value of the land. And it was admitted that all the property attached was returned to plaintiff by defendant, as alleged in his supplemental answer. To show the damage sustained by plaintiff by reason of the attachment, A. L. Shinn, her attorney, testified: That, before commencing the suit, plaintiff asked him what it would cost her. "I told her it was difficult to say what the cost would be; it might be a long suit, and cost her a good deal of money, but I would take the case, and pay all expenses, give my services, and take the chances of getting out. She asked what I would charge, under those conditions. I told her \$2,000. She said, 'That is not enough. Make it \$2,500.' I said: 'I will not quarrel with you on that. I don't know how I will get out of it.'" That

she then gave him her promissory note for \$2,500 due one day after date, and that he was to pay all expenses from the first, and that she paid the note in full in November after the property was returned. He further testified that \$500 would be a reasonable attorney's fee for commencing the action, and that \$1,200 would be a reasonable fee for commencing and prosecuting the action up to its final determination. The court instructed the jury very fully in regard to the law bearing upon the questions presented for decision, and, among other things, told them that, if they should find for the plaintiff, they must find "the value of the property, and assess the damage caused her by the taking and detention of the property. The measure of damages (the property having been returned) is legal interest on the value of the property from the time of taking, and so long as it was held under attachment, and a fair compensation for the time and money properly expended by plaintiff in pursuit of the property, in computing which you may include a reasonable attorney's fee, which attorney's fee must have been actually paid." The verdict was: "We, the jury in the above-entitled cause, find for plaintiff, and find the value of the property taken to be \$9,000, and assess her damages at \$1,500." Of the damages so assessed, plaintiff was allowed, by an order of court, to waive the sum of \$256, and thereupon judgment was entered that the plaintiff recover of and from the defendant the sum of \$1,244 damages, and her costs of suit, taxed at \$265.55. From that judgment, and an order denying a new trial, the defendant appeals.

The only question which need be considered is that relating to the damages awarded to the plaintiff. There was no ground for allowing exemplary damages. Such damages may be given in an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud or malice, actual or presumed: Civ. Code, sec. 3294. But here there was no evidence tending to show that the defendant had been guilty of any oppression, fraud or malice. On the contrary, he appears to have acted fairly toward the plaintiff in all respects, and to have simply performed the duties required of him by law as a public officer. Section 627 of the Code of Civil Procedure provides: "In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defend-

ant, by his answer, claim a return thereof, the jury may, at the same time, assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the taking or detention of such property." And section 3336 of the Civil Code provides: "The detriment caused by the wrongful conversion of personal property is presumed to be: (2) A fair compensation for the time and money properly expended in pursuit of the property." Assuming, without deciding, that in a case like this the plaintiff is entitled to recover a fair compensation for the time and money properly expended in pursuit of the property, the question then is, Does the evidence show such an expenditure of either time or money by the plaintiff as entitled her to the damages awarded? It is apparent that the expenditure must be limited to the time during which the property was detained, and that it cannot be extended beyond the time when the property was returned. There was no evidence that the plaintiff expended any time in pursuit of the property, nor, if she did, as to what was the value of that time. There was no ground, therefore, for allowing her any compensation for time expended. And the only evidence as to money expended was that she gave to her attorney her promissory note, and subsequently paid the same, as before stated. That note was for a gross sum, and was to be in full payment of all expenses of the proposed suit, from its commencement to its final determination. No sum was named or agreed upon as the attorney's fee for his services in the case. And it does not appear what, if any, expenses were incurred, except that, at the end of the controversy, plaintiff had judgment for her costs, in the sum of \$265.55. Under these circumstances, could the money paid by plaintiff to her attorney, or any part thereof, be properly taken into account, in estimating her damages? It has been strongly intimated by this court that money paid for attorneys' fees in pursuit of property is not within the rule of damages declared by section 3336 of the Civil Code: *Greenbaum v. Martinez*, 86 Cal. 462, 25 Pac. 12; *McDonald v. McConkey*, 57 Cal. 325. But the question has never been definitely decided. The general rule is that counsel fees are not recoverable by the successful party in actions either at law or in equity, and it has been held in cases of aggravated trespass, where exemplary damages might be allowed, that attorneys' fees for prosecuting the action could

not be taken into consideration in estimating the damages: *Howell v. Scoggins*, 48 Cal. 355; *Falk v. Waterman*, 49 Cal. 224; *Sedgwick on Damages*, 8th ed., sec. 234. In *Murphy v. Mulgrew*, 102 Cal. 547, 41 Am. St. Rep. 200, 36 Pac. 857, which was an action like this, the court said: "The evidence is insufficient to justify the finding of the court that \$200 is a fair compensation for the time and money expended by the plaintiff in the pursuit of the property. All the evidence bearing upon this question is the fact that plaintiff gave her note for \$200 to her attorneys as a fee for their services in the case. That is wholly insufficient to support the judgment in that regard." Counsel for respondent invoke the rule declared in injunction cases, where the preliminary injunction had been dissolved, and, in an action on the injunction bond, it was held that counsel fees might be recovered. But in *Mitchell v. Hawley*, 79 Cal. 301, 21 Pac. 833, it is said: "The allowance of counsel fees in suits on injunction bonds is exceptional, and it should not be carried beyond the point to which former decisions have taken it. In the injunction suit in which the bond now before us was given, the attorneys for defendants were given \$500 in gross for all their services in the case. They made an effort to get the temporary injunction dissolved, but failed. Afterward the injunction was ended by the dismissal of the action." And it was held that the plaintiff was not entitled to recover any sum for counsel fees. In *Bustamente v. Stewart*, 55 Cal. 115, the court quoted with approval the following language found in *High on Injunctions*, sections 473, 474: "A reasonable amount of compensation paid as counsel fees in procuring the dissolution of an injunction may be recovered in an action upon the bond, if the injunction was improperly or wrongfully issued; the amount being limited to fees paid counsel for procuring the dissolution, and not for defending the action." In *San Diego Water Co. v. Pacific Coast S. S. Co.*, 101 Cal. 216, 35 Pac. 651, it was held, where no effort was made to dissolve a preliminary injunction, except that the case was tried on its merits, and a dissolution of the injunction was made by the final judgment, and the attorneys were simply employed to try the case, and were paid for that purpose, and no other, that counsel fees could not be recovered as damages upon the injunction bond; and see *Curtiss v. Bachman*, 110 Cal. 433, 52 Am. St. Rep. 111, 42 Pac. 910. Without deciding whether, under the

provisions of section 3336 of the Civil Code, attorneys' fees can ever be treated as money properly expended in the pursuit of the property, and therefore recoverable, we think it clear that, in view of the authorities above cited, the plaintiff in this case was not entitled to recover for such fees. Interest on the value of the property during the time it was held under attachment would amount to about \$78. The case should be remanded, with directions to the court below to modify the judgment by striking out all the damages awarded the plaintiff, except the sum of \$78; and in all other respects the judgment and order appealed from should be affirmed.

We concur: Searls, C.; Britt, C.

PER CURIAM.—For the reasons given in the foregoing opinion the cause is remanded, with directions to the court below to modify the judgment by striking out all the damages awarded the plaintiff, except the sum of \$78; and in all other respects the judgment and order appealed from are affirmed.

MAGLINCHEY v. SOUTHERN PAC. CO.

S. F. No. 295; May 8, 1896.

44 Pac. 1021.

Carrier—Minor Running Between Cars to Board Train.—In an action against a railroad company for injuries received by a boy seventeen years old, while attempting to pass between the cars of a freight train to reach a passenger train which he intended taking, an instruction that no recovery could be had if the boy possessed mental capacity to realize the danger to which he was subjecting himself, because the law is that one going into a place of danger assumes the risk, without any restriction as to the qualified measure of care and caution required of one not of full age, was not objectionable, where such qualifications were repeatedly given, and specifically applied in other instructions.

APPEAL from Superior Court, City and County of San Francisco; A. A. Sanderson, Judge.

Action by William Maglinchey, an infant, by his guardian ad litem, Henry Maglinchey, against the Southern Pacific

Company. There was a judgment for defendant and from an order denying a new trial plaintiff appeals. Affirmed.

E. A. Holman and E. H. Shaw for appellant; W. H. L. Barnes for respondent.

HAYNES, C.—Action to recover for personal injuries. The defendant had judgment, and the plaintiff appeals from an order denying his motion for a new trial. The injury occurred September 30, 1894, and the plaintiff was seventeen years of age in the May preceding. He resided with his father in Berkeley, and came to the West Berkeley station, situate at the corner of Third and Delaware streets, to take the local train to San Francisco. He arrived too late for the train he intended to take, and left the station, and went to watch some boys playing marbles, and when he returned to take the next passenger train, and when he was on the opposite side of the street, a freight train came between him and the passenger train, and blocked Delaware street, as he testified; that he waited four or five minutes, and was afraid he would be left, and undertook to cross between two freight cars on the bumpers, when, without notice by bell or whistle or any warning, the freight train started, and his foot was caught between the bumpers, and injured.

The only error specified by appellant is that the court erred in giving to the jury the following instruction: "And further, in this same line of instruction, I say to you that if you find that he was old enough to know what he was doing at this time; that he was old enough to realize, and had mental capacity enough to realize, that he was going into a dangerous place; that he understood the danger that would be likely to occur to him in climbing across this freight car to reach the passenger train, and chose to take the chances of being injured in his endeavor to get over that freight-car—then he cannot recover, because the law in this case assumes that if a man or a youth voluntarily goes into a place of danger, having knowledge and reasoning capacity sufficient to enable him to determine whether it is or is not dangerous, he cannot recover, because the theory on which this action is predicated is that there has been some breach of duty on the part of the railway company, and that the boy in this case himself was free from negligence."

Several instructions requested by plaintiff, stating with great fullness and particularity the qualifications of the general rule as to due care and caution when applied to one not of full age, had been given by the court, the effect of which, appellant claims, was nullified by the instruction excepted to which was last given. A few passages from these instructions may be quoted: "You cannot measure the act of an infant by the standard applied to an adult person of ordinary prudence. . . . The degree of care exercised by an infant does not require the judgment and thoughtfulness that would be expected of an adult. In judging of the conduct of a boy of the years of this plaintiff, it is expected there should be found impulsiveness, indiscretion and disregard of danger, and his capacity is measured accordingly. A boy may have all the knowledge of an adult respecting the dangers which would attend a particular act, but, at the same time, he may not have the prudence, thoughtfulness and discretion to avoid them which are possessed by ordinarily prudent persons of mature years. Hence the rule that the child is not guilty of negligence if he exercises that degree of care which, under like circumstances, a person of his age and capacity would exercise. Whether the plaintiff exercised such a degree of care is for you to decide." These qualifications were reiterated in varying language and form of expression in almost every instruction given. The instruction complained of, though not as full and clear as several of the preceding ones, was not inconsistent with them; and the jury cannot be presumed to have forgotten or disregarded them. The proposition is not controverted that the degree of care and prudence to avoid danger, when applied to children, is that which may reasonably be expected of children of like age, experience and capacity; but as childhood precedes maturity, and grows into it, the standard by which due care is measured also changes, and each year becomes less marked, until it becomes merged in that by which the care and prudence of men are measured, such change being accelerated or retarded by natural or acquired capacity. These things are so familiar to all men, not only from observation but from individual experience, that it is incredible that the repeated and explicit instructions of the court upon that subject should have been forgotten or overlooked. In the instruction immediately preceding the one excepted to, the court said: "Now, taking this case which is about to be submitted

to you, it is for you to say, having seen this young man, this young lad of some eighteen years of age, and noticed his demeanor upon the stand, whether or not he, under the circumstances of this case, exercised such care as could reasonably be expected of a boy of his age." The alleged conflict consists solely of the omission to repeat again the oft-repeated qualification above quoted, and not in the statement of some inconsistent proposition which might have misled the jury. The order appealed from should be affirmed.

We concur: Britt, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order appealed from is affirmed.

LOOSE v. STANFORD.*

S. F. No. 11; May 8, 1896.

44 Pac. 1058.

Sale—Evidence—Appeal.—Plaintiff, While His Mare was on the ranch of defendant's decedent, entered into negotiations for its sale to decedent, through an agent authorized to sell only the mare. Subsequently, after the mare had given birth to a colt, the agent testified that he sold both to decedent, the communications between the parties being by telegraph. Plaintiff permitted decedent to retain possession of the colt for twelve years, during the first three of which the colt developed as a wonderful trotter, and, during the time, asked decedent to give him an additional sum as a gratuity, on account of his good luck in the purchase. Held, that a finding that plaintiff sold both the mare and colt to decedent would not be disturbed.

APPEAL from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by W. A. R. Loose against Leland Stanford, which, on the death of defendant, was continued against Jane L. Stanford, his executrix. There was a judgment for defendant, and plaintiff appeals. Affirmed.

*Rehearing denied.

Reddy, Campbell & Metson for appellant; W. H. L. Barnes and Frank Shay for respondent.

SEARLS, C.—This action was brought December 2, 1891, against the testator, Leland Stanford, to recover possession of a trotting mare commonly known as "Hinda Rose," or for the recovery of \$50,000, the value of said Hinda Rose, in case a delivery of said mare cannot be had, and \$25,000 damages, etc. Defendant answered, denying the ownership of plaintiff; averred that about February, 1880, he purchased said Hinda Rose from the plaintiff, and ever since has been, and still is, the owner of, and in possession of, said mare, etc. Defendant further pleads the bar of plaintiff's cause of action under subdivision 3 of section 338 of the Code of Civil Procedure. The defendant departed this life pendente lite, and Jane L. Stanford, the executrix of his last will, was substituted as defendant. The claim of plaintiff was presented to the executrix for allowance, and was by her rejected, which matters were set up by supplemental complaint. The cause was tried by the court without the intervention of a jury, written findings filed, in favor of defendant, upon the issues of ownership and the statute of limitations, upon which findings judgment went for defendant, from which judgment and from an order denying his motion for a new trial, plaintiff appeals.

The entire question in the case turns upon the sufficiency of the evidence to sustain the findings of the court. Counsel for appellant contend that there is practically no dispute as to the facts, and that the issues involved are of law. They then proceed to demonstrate that, upon the facts as assumed by them, Leland Stanford was the bailee of a mare known as "Beautiful Bells"; that, while in his possession, this mare gave birth to the colt Hinda Rose; that plaintiff sold the mare, but not the colt, to Stanford; that as a result the animal Hinda Rose remained in possession of Stanford, as bailee, for some twelve years, when plaintiff demanded possession of her, which was refused; that this refusal operated as a conversion; and that, as the action was brought within three years next thereafter, the cause of action is not barred by the statute of limitations, and hence that plaintiff is entitled to recover. Assuming the premises of appellant's counsel to be correct, we agree fully with their conclusion. We think, however, that, while there is no substantial conflict in the evidence as to the main

probative facts, the inferences to be deduced therefrom—the ultimate facts upon which the case turns—are open to grave doubt; and while, upon the case as presented by the record, we are not impelled with mathematical certainty to the result reached by the court below, there are yet cogent reasons leading to such result. The testimony is too lengthy for recapitulation. The following summary will convey some idea of its trend. The plaintiff lived at Bodie, Mono county, and was the owner of Beautiful Bells, a brood mare. Defendant, Leland Stanford, was the owner of Palo Alto ranch, upon which he was conducting the business of stock-breeding, and rearing trotting and running horses. In March, 1879, plaintiff caused his mare Beautiful Bells to be sent to Stanford's stock farm, where she was mated with Electioneer, a stallion owned and kept by Stanford. The mare remained on the ranch until the following spring, when, on February 27th, she gave birth to a colt, the subject of the litigation in this cause. Early in the winter Stanford had seen and admired Beautiful Bells, and had authorized Harris F. Covey, his superintendent, to purchase her, if he could do so at a reasonable figure. F. W. Covey, who was at times secretary, and at others assistant superintendent of the stock farm, held a power of attorney from plaintiff authorizing him to sell Beautiful Bells to Stanford for \$2,000. This was more than Stanford was willing to give, and the negotiations were broken off until the month of March or 1st of April, 1880 (after the birth of the colt), when plaintiff telegraphed accepting an offer on behalf of Stanford to pay \$1,200, and remit a bill of \$200 and upward, ranch fees, etc., upon the mare. The money was paid to plaintiff, and the mare and colt sold to Stanford, or, as the witness F. W. Covey says: "Under that power of attorney, I sold Beautiful Bells and her filly, and made the transfers on the books of the Palo Alto stock farm at that date. The books show placed to the credit of Leland Stanford." The negotiations for the sale were both before and after the birth of the filly, of which last fact plaintiff was advised; and Stanford understood, and has always claimed, that he purchased both the dam and colt. Thus matters rested for, say, eleven years, during which the filly, Hinda Rose, was trained as a trotter, making phenomenal speed, and in her yearling, two and three year old, form, beating the then world's record for trotters. At three years of age she broke down, and became useless as

a trotter, whereupon she was placed in stock as a breeder, but has never produced any colts. In the month of November, 1891, plaintiff called at the Palo Alto stock farm, was introduced to Senator Stanford, and stated to the latter, according to the testimony of Marvin, one of the witnesses, "that as she had turned to be such a valuable brood mare, and as he had bought her from him, he thought he could afford to give him something. He stated, 'Senator, I have no claim on you whatever, but I think you could afford to give me something.' " Several other witnesses who were present at the same conversation stated, in effect, that plaintiff claimed that, as Beautiful Bells had done so well, he thought Stanford would be willing to do something for him, etc. Hinda Rose was not mentioned in this conversation. Plaintiff was a witness in his own behalf, and only stated that he never sold, or authorized the sale of, Hinda Rose. The court below may well have reasoned something in this wise: (1) Plaintiff must have known of the renown attained by Hinda Rose, or he would not have been so deeply impressed with the success of Beautiful Bells, whose only claim to greatness, so far as appears, consisted in her being the dam of the former. (2) Knowing of the success of the colt, it is preposterous to suppose that he considered himself its owner, and yet for eleven years never mentioned the fact, or asserted his claim of ownership. (3) The claim that Beautiful Bells had done so well for Senator Stanford that plaintiff supposed the former would be willing to do something for him was not compatible with his claim of ownership, for the reason that if Hinda Rose belonged to him he was the fortunate man, and not Stanford. These and other circumstances, not very important when considered singly, but all pointing in a given direction, were, we think, when combined, sufficient to warrant the court below in finding that the negotiations which began before the birth of the colt, and were not consummated until it was in esse, culminated in the sale of both, and were so understood by the plaintiff at the time, as it certainly was by the defendant; and, as a consequence, warranted the finding of the ultimate fact of ownership in defendant, and the further finding, as a sequence thereof, that the claim of plaintiff was barred under the three years' limitation of the statute. It must be borne in mind that defendant Stanford did not himself conduct the

negotiations, and that Harris F. Covey, who acted for him, had died before the cause was tried. F. W. Covey, who held the power of attorney from the plaintiff, was not authorized thereby to sell the colt, but the final sale was the result of telegraphic communications; and, as they are lost, we can only conclude as to the result of them by the circumstances and conduct of the parties, all of which are consistent with a sale, and inconsistent with any rational theory of continued ownership in plaintiff. We therefore recommend that the judgment and order appealed from be affirmed.

We concur: Vanciel, C.; Britt, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

BURNS v. SENNETT et al.

S. F. No. 31; May 15, 1896.

44 Pac. 1068.

Fellow-servants.—The Slingman of a Stevedore's Crew employed to load a vessel, whose duty it is to stand on the wharf and attach the hoisting tackle to the articles to be loaded, is a fellow-servant of the riggers, whose duty it is to set up and rig the hoisting apparatus to the vessel.

APPEAL from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Patrick Burns against Sennett & Miller for personal injuries. From a judgment of nonsuit plaintiff appeals. Affirmed.

Mullany, Grant & Cushing for appellant; Mastick, Belcher & Mastick for respondents.

PER CURIAM.—This is an appeal from a judgment of nonsuit entered upon the conclusion of the hearing of plaintiff's testimony. All of the evidence is presented by bill of exceptions. Upon the former appeal in this case (*Burns v. Sennett*, 99 Cal. 363, 33 Pac. 916), it was held that, under the evidence before the court, the duty of defendants was

fulfilled when they furnished to the employees suitable material and appliance for the construction and support of the hoisting tackle. As the task of setting up or rigging these appliances and of safely maintaining them was a part of the duty of plaintiff's fellow-employees, the defendants were not liable to plaintiff for injuries which might have resulted to him from a negligent performance of that duty. These propositions are not here questioned. But it is strenuously insisted that the evidence adduced upon the new trial presents a different state of facts, and establishes that the riggers of the vessel were not fellow-servants of the injured man. A most careful examination of the testimony fails to support this claim. It would be profitless to set forth at length the explanations of the different witnesses, but the following brief quotation from the testimony of plaintiff serves as a fair illustration of all: "The foreman of the stevedore firm hires a gang of men, and takes them on board the ship. He directs four or five to go up and rig the vessel—the gear—and just as soon as the gearing is finished we all start to work. That is the usual practice." In view of this evidence and of the opinion upon the former appeal, where the questions are elaborately considered, the judgment is affirmed.

SCRIVANI v. DONDERO.

S. F. No. 254; May 18, 1896.

44 Pac. 1066.

Appeal—Review—Granting of New Trial.—The rule that an appellate court will not disturb a verdict where there is evidence to sustain it does not apply with equal force to the trial judge, who saw and heard the witnesses, and an order granting a new trial will not be reversed unless there has been an abuse of discretion.

APPEAL from Superior Court, Santa Cruz County; J. H. Logan, Judge.

Action by Batisto Scrivani against Charles Dondero. Plaintiff appeals from an order setting aside a verdict in his favor and granting a new trial. Affirmed.

Geo. P. Burke for appellant; Julius Lee for respondent.

PER CURIAM.—This is an action to recover damages for malicious prosecution. There was a verdict and judgment for \$500 in favor of the plaintiff. Defendant moved for a new trial, which was granted. Plaintiff appeals from the order granting a new trial.

The order appealed from states no ground for the decision, but the motion was made upon the ground, among others, of the insufficiency of the evidence to justify the verdict; and, as the record is presented, the order must stand or fall upon the correctness of the ruling on that question. Appellant contends that the court below abused its discretion in granting the order upon the ground stated. This court has uniformly held that motions for new trial are addressed to the sound discretion of the trial courts, and that their action thereon will not be disturbed unless there has been a manifest abuse of discretion. In this case there is a substantial conflict of evidence material to the issue. In *Sherman v. Mitchell*, 46 Cal. 577, the appeal was from an order granting the defendant a new trial, as to which the court said: "In *Dickey v. Davis*, 39 Cal. 569, we said: 'In this court, when there is a substantial conflict in the evidence, we decline to set aside a verdict or finding of facts as being contrary to the weight of evidence, solely because we have had no opportunity to observe the manner of the witnesses and to decide upon their credibility. But this reason does not apply to the district judge, and, though it is the peculiar province of the jury to decide upon the facts submitted to them, generally, in doubtful cases, the verdict ought not to be set aside as contrary to the weight of the evidence, nevertheless, if the judge is not satisfied with the verdict, and is convinced that it is clearly against the weight of the evidence, it is his duty to set it aside, even though there may have been some conflict in the testimony.' " In *Warner v. Thomas Cleaning Works*, 105 Cal. 409, 38 Pac. 960, the court said: "It is . . . settled law that when the evidence is conflicting the trial court is authorized to review it, and if, in its opinion, the verdict is against the weight of the evidence, it is its duty to grant a new trial: *Bjorman v. Redwood Co.*, 92 Cal. 500, 28 Pac. 591; *Domico v. Casassa*, 101 Cal. 411, 35 Pac. 1024, and cases cited." In *Bates v. Howard*, 105 Cal. 173, 38 Pac. 715, this court said: "It is a cardinal doctrine of this court, the oft enunciation of which has rendered it monotonous, that, where upon a question of fact the

testimony in the court below involves a substantial conflict, the action of such court below will not be disturbed": See, also, *Curtiss v. Starr*, 85 Cal. 376, 24 Pac. 806; *Townsend v. Briggs*, 88 Cal. 230, 26 Pac. 108; *Crooks v. Miller*, 89 Cal. 35, 26 Pac. 615; *Jones v. Sanders*, 103 Cal. 678, 37 Pac. 649; *In re Carriger's Estate*, 104 Cal. 81, 37 Pac. 785. The rule invoked by appellant is that which prevails in the appellate court. The lower court is not governed by the same rule: *Bates v. Howard*, 105 Cal. 178, 38 Pac. 715; *Wilson v. Railroad Co.*, 94 Cal. 168, 17 L. R. A. 685, 29 Pac. 861; *Sherman v. Mitchell*, 46 Cal. 577; *Dickey v. Davis*, 39 Cal. 569. The order appealed from is affirmed.

LEWIS v. COLGAN, Controller.*

Sac. No. 164; May 18, 1896.

44 Pac. 1081.

State Board of Examiners—Power to Appoint Expert.—Under constitution, article 4, section 32, forbidding the legislature to pay, or to authorize the payment of, any claim made under a contract "not expressly authorized by the law," the appropriation in act of March 28, 1895 (Stats. 1895, p. 280), "for salary of expert to board of examiners," is unavailable for that purpose, there being no express antecedent authority in the board to appoint such expert.

State Board of Examiners—Power to Appoint Expert.—The performance of quasi-judicial acts by the state board of examiners in auditing claims does not make such board a judicial body, with implied power to appoint an expert and other necessary assistants at the expense of the state.

State Board of Examiners—Powers.—The Several Members of the state board of examiners, which consists of the governor, the Secretary of State, and the attorney general, do not, by virtue of their appointment on such board, carry with them, for exercise therein, the power conferred on them as executive officers, but have only such authority as relates to them as members of the board.

State Board of Examiners—Salary of Expert.—Act of March 28, 1895 (Stats. 1895, p. 280), entitled "An act making appropriations for the support of the government," etc., among which is an appropriation "for salary of expert to board of examiners," cannot be con-

*For subsequent opinion in bank, see 115 Cal. 529, 47 Pac. 357.

strued as creating the office of expert to such board, since the act would to that extent be unconstitutional, as embracing a subject not expressed in the title.

APPEAL from Superior Court, Sacramento County; A. P. Catlin, Judge.

Mandamus by Thomas A. Lewis to compel Edward P. Colgan, as state controller, to draw his warrant in favor of plaintiff for an amount claimed to be due him as expert to the state board of examiners. A demurrer to the answer was sustained and a peremptory writ granted. Defendant appeals. Reversed.

Devlin & Devlin, Burham & Miller and A. E. Bolton for appellant; R. B. Carpenter for respondent.

SEARLS, C.—Mandamus against the defendant, as controller of the state of California, commanding him to draw his warrant in favor of the plaintiff upon the treasurer of said state for the sum of \$166.66 $\frac{2}{3}$, as salary due plaintiff from the said state for services as expert to and for the state board of examiners during the month of July, 1895. An alternative writ of mandate issued to defendant, who demurred to the verified petition, and, upon his demurrer being overruled by the court, answered the petition. Plaintiff moved to strike out the fourth paragraph of defendant's answer, and demurred to the residue thereof. The motion to strike out was granted, and the demurrer sustained, and a peremptory writ granted. Defendant appeals, and the cause comes up on the record illustrated by a bill of exceptions. The substance of the verified petition upon which the writ issued is that "on the twenty-eighth day of June, 1895, plaintiff was employed by the state board of examiners as expert for said board of examiners, at an annual salary of two thousand dollars, payable monthly, and necessary traveling expenses in the business of said employment"; that he entered upon the discharge of the duties of such employment July 1, 1895, and continued to act as expert, etc., during the month of July, whereby there became due him from the state of California the sum of \$166.66 $\frac{2}{3}$. The board of examiners duly audited, allowed and approved his claim for said sum of money. The controller, upon demand, refused to draw his

warrant on the state treasurer in favor of the plaintiff therefor. The more formal portions of the petition are here omitted.

The question presented in the whole case practically relates to the duty of the defendant as controller, upon the foregoing facts, to draw his warrant in favor of the petitioner on the state treasurer. The petitioner does not specify any authority on the part of the board of examiners to employ him as an expert, and our attention is not called to any statute or law conferring such authority, unless it is to be found in the statute in relation to appropriations, hereinafter mentioned. The petitioner contents himself with stating as a fact that he "was employed by the state board of examiners as expert," etc. The act making appropriations for the support of the government of the state of California, for the forty-seventh and forty-eighth fiscal years, approved March 28, 1895 (Stats. 1895, p. 280), makes an appropriation as follows: "For salary of expert to board of examiners, four thousand dollars." "For traveling expenses of board of examiners and expert, two thousand dollars." The board of examiners is the creature of the statute, and consists of the governor, the Secretary of State, the attorney general, and the secretary of the board, who is an ex-officio member, and only authorized to act in the absence from the capitol of any two members: Stats. 1893, p. 182; Pol. Code, sec. 364. The law provides for a secretary and assistant secretary for the board, and a clerk: Pol. Code, secs. 654-685. Provision is also made for the appointment by the board of a "printing expert," to examine and report upon the character and value of printing done for the state: Pol. Code, sec. 679. Beyond these provisions we are not aware that the board of examiners is authorized by any positive law to appoint or employ any subordinates, assistants or employees. The duties of the state board of examiners are prescribed by section 654 et seq., article 18, chapter 3, title 1, part 3, Political Code. Among these duties the board is required to examine the books and accounts of the controller and treasurer, to count all moneys in the state treasury, and, under section 672, to audit all claims against the state which are not especially exempted from the provisions of that section, other than claims for official salaries, and claims upon the contingent fund of either house of the legislature.

The contention of appellant is that no office can be created by the general appropriation bill, and that the appropriations named therein can only be expended for some object antecedently authorized. As to the first branch of the proposition, it is sufficient to say that the appropriation bill from which we have quoted does not make any attempt to create an office or agent, or to authorize the appointment by others of any officer or agent, or to employ servants or assistants. It simply appropriates given sums of money for specific objects therein named, and among them a given amount "for salary of expert to board of examiners." Had the legislature attempted by the appropriation bill to do more than to appropriate money, that portion of it would have been void, because the object was not stated in the title of the act, which is "An act making appropriations for the support of the government of the state of California for the forty-seventh and forty-eighth fiscal years." Section 24 of article 4 of the constitution provides that "every act shall embrace but one subject, which subject shall be expressed in its title. But if any subject shall be embraced in an act which shall not be expressed in its title, such act shall be void only as to so much thereof as shall not be expressed in its title." As bearing upon the latter branch of the proposition, viz., that an appropriation can only be expended for some object authorized by law, it is pertinent to say that, under section 31 of article 4 of the constitution, the legislature is deprived of the power to give or lend the credit of the state, "nor shall it have power to make any gift, or authorize the making of any gift, of any public money or thing of value to any individual," etc. Section 32 of the same article provides, so far as applicable here, as follows: "The legislature shall have no power to . . . pay, or to authorize the payment of, any claim hereafter created against the state, . . . under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void."

Respondent contends, in substance, that the board of examiners, in auditing and allowing or rejecting claims against the state, acts judicially, and that, as a judicial body, the board has power to appoint such assistants and subordinates as may be necessary to discharge its duties. It has often been held that all independent departments of government are vested with governmental functions, and may, as an incident of the

powers conferred, exercise such incidental powers as are necessary to a due exercise of the express powers conferred. Under this head, it has been held that courts of record, and especially courts of last resort, may, when necessary to the conduct of their business, and where no suitable provision has been made therefor by the other departments of the government, procure suitable places in which to hold court, provide fuel, lights, suitable furniture, appoint necessary janitors, clerks, bailiffs, etc. These authorities are founded upon the principle that no one department of the government can be divested of its power to act by the willful or negligent conduct of the other co-ordinate departments. The board of examiners is not, however, in any proper sense, a judicial body; and were it so, and in the exercise of functions properly belonging to the judicial department of the government, its organization would be void under section 1 of article 3 of the constitution, which provides that the powers of the government "shall be divided into three separate departments; and no person charged with the exercise of powers properly belonging to one of those departments shall exercise any functions appertaining to either of the others, except as in this constitution expressly directed or permitted." The membership of the board of examiners is composed of the highest officers of the executive department of the state. Their exalted position, we may suppose, was regarded as a guaranty of their character, capacity and fitness for the important duties imposed upon them as members of the board. When the board, pursuant to the statute, examines, audits, adjusts, and allows or rejects claims against the state, its acts are so far of a judicial character that their decision as to the facts is conclusive, unless reversed on appeal: *Black on Judgments*, sec. 532. Like considerations apply to similar acts by boards of supervisors, county commissioners and auditors: *Colusa Co. v. De Jarnett*, 55 Cal. 373. It would hardly be contended, we think, that the performance of these quasi-judicial acts by local boards of audit, constitutes them judicial bodies and draws to them all the incidental powers of courts of justice. The board of examiners is a creature of the statute, possessing no authority except that conferred upon it by the law of its creation. In its relation to the several departments of the government, it is simply a local board, exercising limited powers, taking to itself nothing of authority not clearly conferred or necessarily implied from

the language of the statute under which it acts, and from which its authority emanates. The several officers composing the board do not, by virtue of their appointment to membership on such board, carry with them, for exercise therein, the powers conferred upon them by the constitution or general laws, but only such as relate to them in their capacity of members of the board. If the board of examiners, by virtue of the duties imposed upon it, may appoint an expert, then, by parity of reasoning, boards of supervisors, county commissioners, auditors and other like bodies and individuals, performing like or similar services, should be entitled to make like appointments. We are of opinion the board of examiners possesses neither the inherent nor delegated power to make such appointment, and that the attempt so to do was in excess of the authority of the board, and void. Under the constitution of this state adopted in 1849, the foregoing conditions might have existed without detracting from the right of the petitioner to the salary appropriated for his benefit. The legislature was not under it, as now, restricted in that respect. As was said in *Blanding v. Burr*, 13 Cal. 350: "It may appropriate [the public moneys] to claims which have no legal obligation, and are founded only in justice. Of the propriety of the appropriation, as of the expediency of the taxation, it is the sole judge. With the exercise of the power in either case the judiciary cannot interfere." Under section 32 of article 4, *supra*, of the present constitution, however, it may not appropriate money to pay any claim founded upon any agreement or contract "made without express authority of law, and all such unauthorized agreements or contracts shall be null and void." We think the record shows that the agreement or contract by which petitioner was to serve as an expert to the board of examiners was "made without express authority of law," and hence that the appropriation in payment thereof was in violation of the constitution, and that the demurrer to the petition should have been sustained.

The motion to strike out a portion of defendant's answer was properly granted.

The matter set up in the fourth paragraph was irrelevant matter, not material to the defense.

We recommend that the judgment be reversed and the cause remanded, with directions to the court below to sustain the demurrer to plaintiff's verified petition.

We concur: Belcher, C.; Britt, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is reversed and the cause remanded, with directions to the court below to sustain the demurrer to plaintiff's verified petition.

RANDOL v. ROWE.

S. F. No. 33; May 19, 1896.

44 Pac. 1068.

Setoff.—An Equitable Estoppel to Plead a Setoff of a note in an action on an account against defendant, which had been assigned to plaintiff by the maker of the note, did not arise out of the assignor's direction to defendant, after the assignment, to pay the amount of the account to plaintiff, and defendant's silence as to his possession of said note, it not appearing that plaintiff had knowledge of such request.

APPEAL from Superior Court, Santa Clara County; W. G. Lorigan, Judge.

Action by J. B. Randol against William Rowe on an account. From the judgment rendered plaintiff appeals. Affirmed.

J. H. Campbell for appellant; C. L. Witter and D. W. Burchard for respondent.

BELCHER, C.—The facts of this case, briefly stated, are as follows: In July, 1893, one Z. H. Martin sold and delivered to the defendant a certain quantity of hay, for which the agreed purchase price was \$541.17. On or about July 15, 1893, defendant paid Martin, for and on account of the hay, the sum of \$194.37, leaving a balance still due therefor of \$346.80. On August 2, 1893, Martin assigned and transferred

his said claim to the plaintiff, who has ever since been the owner and holder thereof. On February 25, 1893, Martin executed and delivered to one Hornberger his negotiable promissory note for \$675, payable thirty days after date, with interest; and thereafter, on July 25, 1893, Hornberger indorsed and transferred the said note to the defendant, who has ever since been the owner and holder thereof. Before the said transfer there was paid on the note the sum of \$75, and the balance of principal and interest remains due and unpaid. On July 14, 1894, the plaintiff commenced this action to recover the sum of \$346.80, with interest, alleged to be due on his said assigned claim, and the defendant pleaded as a counterclaim thereto the said note assigned to him. The court below allowed the counterclaim, and gave judgment that the plaintiff take nothing by his action, and that defendant recover his costs. The plaintiff appeals from the judgment, upon the judgment-roll, and contends that the court erred in allowing the counterclaim.

Substantially the same question as that involved in this case arose, and was quite elaborately discussed, in *Bank v. Gay*, 101 Cal. 286, 35 Pac. 876, and the decision was adverse to the contention of appellant here. That decision we consider decisive of this case, and a further discussion of the question is therefore unnecessary.

The point is made that "the defendant is estopped by his tortious silence from asserting the alleged counterclaim." This point is rested upon a finding of the court which is as follows: "That after the said assignment by Z. H. Martin to the plaintiff, and about the fourth day of August, 1894, said Z. H. Martin told the defendant thereof, and requested him to pay said assigned claim to plaintiff, and the defendant made no objection or response thereto, and neither then or theretofore, nor at any time until afterward, gave notice or made any mention to plaintiff or said Z. H. Martin of the assignment of said note to him." The year, as above written, should probably be 1893, and not 1894; but, whether so or not, we see no ground in the facts found for invoking the doctrine of estoppel. The well-settled rule is that, to create an equitable estoppel, the person sought to be estopped must do some act or make some admission to influence the conduct of another, which act or admission is inconsistent with the claim he proposes now to make, and the other party must

have acted on the strength of such act or admission. At the time named, Martin had no interest in the transaction, and it does not appear that the plaintiff ever knew of the interview referred to, and certainly it cannot be said that his conduct was ever influenced thereby. The judgment should be affirmed.

We concur: Britt, C.; Vanciel, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

LUDY v. COLUSA COUNTY.*

No. 18,403; May 27, 1896.

45 Pac. 166.

County—Claim for Repair of Highway.—In an action against a county, by a road overseer, to recover for services and money expended in the repair of county roads, testimony of the road commissioner that he had spoken to plaintiff in regard to working on the public roads, and had always directed him not to run in debt in excess of the funds appropriated for such work, and that he did not know anything about plaintiff's doing the work on which his claim was based until the bills therefor came in, is insufficient to show that the work in question was authorized by the commissioner, so as to authorize plaintiff to recover therefor.

Garoutte, J., dissenting.

APPEAL from Superior Court, Colusa County; E. A. Bridgford, Judge.

Action by one Ludy against the county of Colusa. There was a judgment for defendant and plaintiff appeals. Affirmed.

M. J. Keys for appellant; Ernest Weyand for respondent.

HARRISON, J.—The plaintiff was the road overseer of road district No. 6 of the county of Colusa, from January 1,

*Rehearing denied. For former opinion, see ante, p. 99, 41 Pac. 300.

1891, until May 12, 1891. Between March 31st and May 12th of that year, as such overseer, he performed work and expended moneys upon the roads in that district, and others, at his instance and request as such overseer, also performed work and furnished materials for the benefit of the roads in the district. Claims on behalf of the plaintiff and the others who had been employed by him were presented to the board of supervisors of the county, and upon their rejection the others assigned their claims to the plaintiff, and the present action was brought by him for the recovery of the whole amount of said claims. The cause was tried by the court without a jury, and the court found that "there was no direction of the board of supervisors of Colusa county, nor of any member thereof, or of the road commissioner of said district No. 6, nor of any road commissioner, to the said plaintiff, W. W. Ludy, road overseer of said road district No. 6, nor to anyone else, to do the work alleged in the complaint to have been done, or any part thereof, or to furnish material as in said complaint alleged, or any part thereof." Judgment was thereupon rendered in favor of the defendant, from which, and from an order denying a new trial, the plaintiff has appealed.

The following provisions of the Political Code were in force at this time:

"Sec. 2641. Each supervisor shall be ex-officio road commissioner of the several road districts in his supervisor district, and shall see that all orders of the board of supervisors pertaining to the roads in his district are properly executed.

"Sec. 2642. The road overseer shall, under the direction of the road commissioner of his district, perform the duties in this chapter hereinafter specified.

"Sec. 2643. The boards of supervisors of the several counties of this state shall have general supervision over the roads within their respective counties. They must by proper ordinance: . . . (7) Order and direct overseers, specially in regard to work to be done on particular roads in their districts."

Each of the several county government acts that the legislature has passed has also, in subdivision 4 of section 25 in the several acts, given to the board of supervisors of their respective counties jurisdiction and power to lay out, maintain, control and manage public roads, turnpikes, ferries and

bridges within the county. Section 2645 of the Political Code, as it was amended March 19, 1889 (Stats. 1889, p. 339), provided as follows: "Road overseers, under the direction and supervision of the road commissioners, and pursuant to orders of the board of supervisors, must: (1) Take charge of the highways within their respective districts, and shall employ all men, teams, watering carts, and all help necessary to do the work in their respective districts." And, as thus amended, it was in harmony with the provisions of section 25, subdivision 4, of an amendment to the county government act, which was passed three days earlier at the same session of the legislature (Stats. 1889, p. 232), by which road overseers, in their respective districts, were authorized "to employ all labor required, and direct the conduct of work of any kind done upon any and all public roads." At the next session of the legislature, however, a new county government act was passed, March 31, 1891 (Stats. 1891, p. 295), which took effect immediately, in which, by section 25, subdivision 4, this power was taken away from the road overseers, and it was provided that "the road commissioners in their respective districts shall employ all labor required, and direct the conduct of work of any kind done upon any and all public roads." On the same day section 2642 of the Political Code was amended (Stats. 1891, p. 474) by providing that the office of road overseer should be abolished, and that "whenever in this code the words road overseer occur, they shall be taken and construed so as to read road commissioner." The provisions of this act did not take effect, however, until January, 1893, so that the office of road overseer was continued until that time, with its duties modified by the above provision of the county government act. The road overseer was still required to take charge of the highways, and perform certain duties, under the direction of the road commissioner, but he was not authorized to employ any labor therefor. The complaint in the present action alleges that all of the labor performed by the plaintiff and by the others, as well as the moneys expended by the plaintiff, for which this action is brought, was performed and expended after the 31st of March, 1891; and not only is there no averment that the labor, either of the plaintiff or of the others, was employed by the road commissioner, but it is expressly alleged that it was all done at the special instance and request of the plaintiff, and

the court finds that there was no direction of the road commissioner to do the work, or to furnish the material.

At the trial the supervisor who was the road commissioner for the district embracing road district No. 6 testified that he had spoken with the plaintiff in relation to working on the public roads in that district, and had always told the road master not to run in debt. On cross-examination he was asked: "If you ever did speak to Mr. Ludy on the subject of doing work, you only told him not to do work in excess of the amount of money apportioned for the payment of the indebtedness—not to run the district in debt in excess of the funds of the district?" to which he replied: "Yes, sir; that was the understanding with all the roadmasters." The plaintiff contends that from this testimony the court should have found that he was properly directed to do the work, and that the above finding of the court was contrary to the evidence. The witness, however, testified that he did not know anything about the plaintiff's doing the work, and did not know anything about the work, until the bills came in. Under these statements of the witness, we cannot say that the decision of the court was not justified by the evidence. There was no evidence that the road commissioner ever employed the plaintiff to do any work, or authorized him to employ other labor. As the statute did not confer upon the plaintiff any authority to employ labor for the improvement of the roads, and thereby create a charge against the county, the plaintiff not only did not state a cause of action in his complaint, but he failed at the trial to establish any claim against the county, either on behalf of himself, or either of his assignors. The judgment and order are affirmed.

We concur: Beatty, C. J.; Temple, J.; Henshaw, J.

GAROUTTE, J.—I dissent. This is an action brought against the county of Colusa by one Ludy, road overseer of a certain road district in that county. He brought the action for labor performed by himself upon the public roads, and also as assignee of the claims of some fifteen others for labor performed upon these roads, and material furnished which was used thereon. There is no claim of any kind made that the services were not performed and the materials furnished, nor any claim that the prices charged were excessive, but, upon the contrary, the record shows plaintiff attempting to

recover an honest debt of Colusa county, and it should be paid. Two questions only are presented by the record upon this appeal: First, as to the sufficiency of the allegations of the complaint to support a judgment; and, second, as to the sufficiency of the evidence. It is conceded that if plaintiff, as road overseer, was authorized to do this work by the road commissioner of the district, such authority would be sufficient; but it is now insisted that there is no allegation in the complaint to that effect, and that, therefore, a cause of action is not stated. Under the facts disclosed by the record, a recovery by plaintiff should not be defeated upon any such grounds. Those facts are these: (1) A general demurrer to the sufficiency of the complaint was overruled by the trial court; (2) the complaint contains a general allegation of indebtedness from defendant to plaintiff of the amounts set out therein; (3) evidence was introduced at the trial as to the plaintiff's authority from the road commissioner to do the work; (4) the court made a finding of fact upon such evidence; (5) the court treated the allegation of indebtedness stated in the complaint as a material and sufficient allegation of the fact, and made a finding upon the issue created by the answer in that respect. For these reasons, in common justice, we are bound to hold that now the complaint should be deemed sufficient to support the judgment. To hold otherwise, a party would be wronged of a most substantial right by invoking a very technical rule of law. The court made a finding of fact that plaintiff was not authorized by the road commissioner to do the work. We are clear that this finding is directly opposed to the evidence. The only testimony offered upon this point was that of Mr. Herd, the road commissioner, who testified as follows: "Q. Did you ever speak to Mr. Ludy [road overseer] with relation to working upon the public roads of that district, in the spring of '90 and '91? A. Oh, yes; we always talked about the roads. Q. Did you tell Mr. Ludy at any time that he was running in debt, and was doing more work than was required? A. No; I don't know anything about him doing that work, in fact. Q. You say you don't know whether you spoke to Mr. Ludy concerning doing work, or not doing work? A. I am not positive about it. I presume I did, though. Q. You presume you did? A. Yes, sir. Q. If you ever did speak to Mr. Ludy on

the subject of doing work, you only told him not to do work in excess of the amount of money apportioned for the payment of the indebtedness—not to run the district in debt in excess of the funds of the district? A. Yes, sir; that was the understanding with all the roadmasters.” There is but one construction to be put upon this evidence, and that is that the road overseer had general authority from Mr. Herd to do the necessary work in repairing the roads of his district, to the extent of the money on hand in the road funds of that district, and there is no pretension here that such instructions were violated. Conceding that the commissioner did not know plaintiff was doing the particular work upon which a recovery is here sought, that fact is immaterial; for the work was done under a general authority, which, we have seen, was plainly conferred.

DAVEY v. SOUTHERN PAC. CO.*

No. 15,999; May 27, 1896.

45 Pac. 170.

Railroads—Injuries to Licensee on Right of Way.—A complaint for injuries sustained by falling into an excavation between the tracks of defendant's road alleged that the right of way was an easement in a public highway. On trial, plaintiff admitted that the fee of the right of way was in defendant. Without any amendment, and without objection from defendant for variance, the trial proceeded on the theory that plaintiff could recover as a licensee, and that the excavation was in a path in general use by the public, to the knowledge and acquiescence of the defendant. Held, reversible error to exclude evidence that the path had been used constantly by the public, without objection from defendant, on an objection that it was “immaterial, irrelevant, and incompetent,” since the objection was insufficient to raise the point of variance.

APPEAL from Superior Court, City and County of San Francisco; Charles W. Slack, Judge.

Action by Rosalie Davey against the Southern Pacific Company. From a judgment of nonsuit plaintiff appeals. Reversed.

*For subsequent opinion in bank, see 116 Cal. 325, 48 Pac. 117.

Gordon & Young for appellant; Maxwell, Dorsey & Soto and Maxwell & McEnerney for respondent.

HENSHAW, J.—The action was for damages for personal injuries. At the conclusion of plaintiff's evidence defendant moved for and was granted a nonsuit. Plaintiff pleaded that defendant operated its railroad upon a public highway in Alameda county, known as "Stanford street." She averred that there was a culvert or drain crossing Stanford street, and extending under the tracks of defendant, which drain was securely and safely covered with planking and earth. Defendant opened this culvert, and left it "open and unprotected and in a dangerous condition for the whole length across said Stanford street, and under the track" of defendant. Upon the night of the accident, plaintiff "proceeded to cross said railroad track on said street," and was precipitated down through and between the rails of said track into the excavation. By this fall, and in this manner, she suffered the injuries complained of. It will be noticed that the complaint charges that the defendant corporation maintained its road upon a public highway. It clearly appears to have been the intent of the pleader to charge defendant with negligence in having laid open and left unguarded a drain or culvert upon a highway over which it had merely an easement in common with the general public. The complaint will bear no other construction. In such a case it is well settled that a railroad, having only an easement over a public street, possesses no rights therein superior to those of the public, saving such as the nature of its occupancy and use necessitate. A traveler upon that public highway may cross and recross the tracks of the railroad at his pleasure, and may expect to find that portion of the street covered by the roadbed of the railroad in a reasonably safe condition for public use and travel. Entirely different, however, is the rule and right of such a corporation operating its road over a right of way, upon land which it owns in fee. Here it not only enjoys all the incidents of private ownership; but from the well-known character of its use, and the necessity for swift and uninterrupted locomotion over its land, one who obtrudes upon the right of way is a trespasser, guilty of gross negligence, and the railroad generally owes him no duty further than to guard against his

wanton injury. But though plaintiff, in effect, pleaded that defendant's right of way was an easement over a public highway, upon the trial she abandoned this position. She admitted that the right of way is on land owned by defendant in fee, and undertook, without change or amendment of the complaint, to establish that for many years a footpath led to and crossed the track at the point of the accident, and that this footpath was openly, constantly and continuously used by the neighborhood without let or hindrance from defendant. It was claimed that the nature of the use shown would, inferentially, establish knowledge upon the part of defendant, and that plaintiff, in crossing the track upon this path and under these circumstances, was not a mere trespasser, but did so under acquiescence, and as a licensee of the defendant company. This evidence was all excluded under objection by defendant's attorney that it was "immaterial, irrelevant, and incompetent." The court, in ruling said: "If you can show the railroad company knew this, and made no objection to it, I will allow it." This evidence was clearly inadmissible under proper objection. It did not tend to establish any issue joined by the pleadings. There was a manifest variance between the complaint which charged a dangerous excavation made upon a public highway and evidence which sought to show an excavation made upon the private property of defendant along the line of a footpath over which plaintiff was licensed to pass. The difficulty which arises comes from the fact that no proper objection was made. The question of variance was never presented for consideration to the trial judge, or to opposing counsel, and is here made for the first time. The objection made in the trial court is insufficient to present the point: *Dikeman v. Norrie*, 36 Cal. 94; *McKay v. Riley*, 65 Cal. 623, 4 Pac. 667; *Howland v. Railway Co.*, 110 Cal. 513, 42 Pac. 983. The case seems to have been tried upon the theory that the evidence was admissible under the pleadings, but that the plaintiff must establish knowledge by defendant of the use of its land for a footpath. But the evidence which the court refused to admit was directed to the proof by inference of the knowledge of defendant, as well as to the existence and use of the path. As in *Hansen v. Southern Pac. Co.*, 105 Cal. 379, 38 Pac. 957, plaintiff sought to show a use which would carry with it the inference of knowledge, since, as to

its own property rights, defendant would be presumed to know what was generally known: *Railroad Co. v. Troutman*, 11 Week. Notes Cas. 453; *Davis v. Railway Co.*, 58 Wis. 646, 46 Am. Rep. 667, 17 N. W. 406; *Isabel v. Railroad Co.*, 60 Mo. 475; *Griffiths v. Railway Co.*, 14 L. T., N. S., 797. The evidence, therefore, would have been admissible under a proper pleading. Whether it would have proved sufficient to establish a license in plaintiff, and knowledge and acquiescence in defendant, were matters which, under proper instructions, were for the jury to decide: *Noyes v. Railroad Co.*, 92 Cal. 285, 28 Pac. 288; *Hansen v. Southern Pac. Co.*, 105 Cal. 379, 38 Pac. 957; *Troy v. Railroad Co.*, 99 N. C. 298, 6 Am. St. Rep. 521, 6 S. E. 77; *Barry v. Railroad Co.*, 92 N. Y. 289, 44 Am. Rep. 377; *Byrne v. Railroad Co.*, 104 N. Y. 362, 58 Am. Rep. 512, 10 N. E. 539; *Townley v. Railroad Co.*, 53 Wis. 626, 11 N. W. 55; *Taylor v. Canal Co.*, 113 Pa. 162, 57 Am. Rep. 446, 8 Atl. 43; *Davis v. Railway Co.*, 58 Wis. 646, 46 Am. Rep. 667, 17 N. W. 406.

The motion for a nonsuit was made upon the ground that the evidence showed that plaintiff was a trespasser, to whom defendant owed no duty. Such, indeed, was the showing of the evidence, since all that plaintiff offered to establish that she was at the place of injury under permission was rejected. While, therefore, the nonsuit was properly granted under the admitted evidence, for the error in rejecting plaintiff's offered evidence the judgment is reversed and the cause remanded.

We concur: McFarland, J.; Temple, J.

STITES et al. v. GATER.

S. F. No. 45; June 2, 1896.

45 Pac. 185.

Ejectment — Pleading — Answer — Admission.—In ejectment for two and twelve hundredths acres of land plaintiffs alleged they were owners, and that defendant excluded them from possession. Defendant's answer denied every allegation "except as hereinafter stated," and then admitted defendant was in possession of one and sixty-five hundredths acres, and that he withheld the same from plaintiffs; but

denied the possession or withholding of the remainder. Held, that the answer did not admit that plaintiffs owned forty-seven hundredths of an acre of the land.

APPEAL from Superior Court, Sonoma County; S. K. Dougherty, Judge.

Ejectment by A. H. Stites and others against J. E. Gater. From a judgment for defendant, plaintiffs appeal. Affirmed.

Moreland & Norton (Rutledge & Pressley of counsel) for appellants; Albert G. Burnett and J. R. Leppo for respondent.

BRITT, C.—Ejectment for two and twelve hundredths acres of land. The pleadings were unverified. Plaintiffs alleged that they are the owners of the land described in the complaint, and that defendant excludes them from the possession thereof. By his answer defendant denied generally “each and every allegation in said complaint contained except as hereinafter stated.” He then expressly admitted himself to be in possession of one and sixty-five hundredths acres of the premises demanded by plaintiffs, and that he withholds the same from them, but denied the possession or withholding of the remainder. The court found that plaintiffs are not the owners of the lands claimed by them, or any part thereof, and rendered judgment in defendant’s favor. Plaintiffs claim here that the findings and judgment contravene the pleadings, because, they say, the answer admits that plaintiffs own forty-seven hundredths of an acre of the land. The allegation of ownership in the complaint is put in issue by the general denial of the answer, and the denial is not qualified by the subsequent admissions. Plaintiffs were therefore put to their proofs as to all the land described in their complaint. The appeal is without merit, and the judgment should be affirmed.

We concur: Vancief, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

NEIHAUS et al. v. MORGAN et al.

S. F. No. 244; June 2, 1896.

45 Pac. 255.

Action—Motion to Dismiss When Judgment not Entered in Time.—A motion to dismiss an action tried to the court, on the ground that plaintiff has neglected to have judgment entered for more than six months after decision, is not authorized by Code of Civil Procedure, section 581, where neither party is entitled to judgment at the time, because written findings have not been prepared and approved by the judge, or waived by the parties.¹

Mechanic's Lien—Statement of Claim.—Code of Civil Procedure, section 1187, prescribing what facts must be stated in the recorded claim of a mechanic's lien, inter alia, requires a statement of claimant's "demand after deducting all just credits and offsets," but does not require a statement that the materials furnished and used were furnished "to be" used in the buildings. Held, that the claim of lien need not contain such statement.

Mechanic's Lien.—A Claim of Lien on Two Buildings Stated that the reasonable value of the materials furnished by plaintiffs for each house was \$182.70, no part of which had been paid, and that the sum of \$365.40, "in gold coin of the United States," was still due on such buildings, after deducting all just credits and offsets. Held, that the claim was not open to the objection that it did not state the amount of plaintiffs' demand after deducting all just credits and offsets, because of the quoted words.

Mechanic's Lien.—In an Action to Enforce a Mechanic's Lien on two buildings, the decree was that plaintiffs have a valid lien on the houses and lot for the sums found due them; that the sheriff sell the property, and from the proceeds of the sale pay plaintiffs the sums found due them, viz., \$365.49 on account of their claim, \$50 for attorneys' fees, and \$45.60 for their costs; and that he bring the surplus money, if any, into court, to abide its further order. Held, that the decree was not open to the objection that it was unintelligible, and incapable of being executed by the sheriff.

APPEAL from Superior Court, Alameda County; John Ellsworth, Judge.

Action by Neihaus Bros. & Co. against Mattie Morgan and others to enforce a mechanic's lien. From a decree for

¹ Cited in Rickey Land etc. Co. v. Glader, 153 Cal. 180, 94 Pac. 769, as showing that dismissal in such cases has been recognized always, as within the trial court's discretion.

plaintiffs and an order denying a new trial defendant Mattie Morgan appeals. Affirmed.

Ben Morgan for appellant; Philip Teare and T. F. Graber for respondents.

VANCLIEF, C.—The appellant, Mattie Morgan, wife of defendant Benjamin F. Morgan, being the owner of a lot in the town of Berkeley, County of Alameda, having a frontage of one hundred feet on Channing Way, and extending therefrom three hundred and four and one-half feet, entered into a written contract with defendants Higgins, Davidson & Co., by the terms of which the latter agreed to build two dwelling-houses on said lot, and to furnish all the materials therefor, and the former agreed to pay for the building of said houses \$6,000, by certain installments, the last of which installments was to be paid when both houses should be completed. A memorandum of the contract was filed with the recorder of Alameda county before the commencement of the work, but did not state nor show that twenty-five per cent, or any part of the contract price for the building of said houses, or either of them, was made payable at least thirty-five days after the final completion of the work on said houses, or on either of them, or at any time after such completion, but did show that the final payment was to be made when and as soon as both houses should be completed, and all bills paid and liens waived. This action was brought to enforce a lien on said houses and lot for the reasonable value of materials alleged to have been furnished by plaintiffs at the request of Higgins, Davidson & Co. and appellant, to be used, and which were used, in the construction of said houses, which reasonable value is alleged and found to have been \$365.40, and also to enforce two other similar liens for materials furnished—one in favor of Oscar Mayer for \$100, and the other in favor of Henry Andrew for \$306.60—the demands secured by which had been assigned to the plaintiffs. The trial court found in favor of plaintiffs on their claim of \$365.40 for materials furnished by themselves, but in favor of the appellant on the two demands which had been assigned to plaintiffs, on the ground that the claims of lien for the assigned demands had not been filed in the recorder's office within thirty days after the completion of the houses. A final decree in accordance with these findings was entered, from which, and from

an order denying a new trial, the defendant Mattie Morgan appeals.

1. Immediately after trial the cause was submitted to the trial court on briefs thereafter to be filed. Thereafter, on May 20, 1893, that court, in the absence of plaintiffs' attorneys, orally announced its conclusions of law, which the clerk entered in the minutes as follows: "It is ordered that judgment be, and the same is hereby, entered for plaintiffs, foreclosing lien of plaintiffs filed by them for \$365.10 and costs, and \$50 for attorneys' fees; and it is further ordered, adjudged, and decreed that the prayer of plaintiffs for judgment on the assigned claims of Messrs. Andrew and Mayer be, and the same is hereby, denied." No order or request was made that the attorneys for either party draw findings, and no written findings were made or filed, and no formal judgment entered, within six months after the entry of said minute order of May 20, 1893. After the expiration of six months from the entry of said minute order, Mr. Ben Morgan, as attorney for the defendant Mattie Morgan, moved the court to dismiss the action "on the ground that said plaintiff has neglected to demand and have judgment entered for more than six months from the date of the decision, he being during all of said time entitled thereto." The court denied this motion, and the attorney for defendant excepted. Thereafter written findings of fact and conclusions of law were filed, in accordance with which a formal decree was then entered enforcing the lien for the sum of \$365.40, without interest, and for costs. Counsel for appellant contends that the denial of the motion to dismiss the action was error for which the judgment should be reversed, and, as authority for this, relies upon the sixth division of section 581 of the Code of Civil Procedure. It has been held by this court that the sixth division of section 581 is not mandatory, and that the exercise of the discretionary power of the court in granting or denying a motion to dismiss an action for the cause therein mentioned will not be disturbed, except for an apparent abuse of such power: *Rosenthal v. McMann*, 93 Cal. 505, 29 Pac. 121; *In re McDevitt*, 95 Cal. 17, 30 Pac. 101; *Marshall v. Taylor*, 97 Cal. 422, 32 Pac. 515. The only showing of negligence on the part of plaintiffs' attorneys, in addition to the facts above stated, is the affidavit of defendant's attorney "that on or about the twenty-fifth

day of May, 1893, Philip Teare, one of the attorneys for the plaintiffs, informed deponent that the above-entitled cause had been decided by the court, but that his associate, Mr. T. F. Graham, was dissatisfied with said decision," thus showing merely that plaintiffs' attorney had notice of the minute order above stated about five days after it was made, and that he was dissatisfied with it. On the part of plaintiffs, the affidavits of their attorneys are to the effect that, after the announcement of the conclusions of the court, they applied to the judge to reconsider the evidence, and the law applicable thereto, before making written findings, and that the judge had promised so to do; that, unless he changed the conclusions of law as expressed in said minute order, they had intended to move for a new trial; that a few days before the motion to dismiss the action, they had prepared written findings, which, by request of the court, they submitted to defendant's attorney, who did nothing with them; and that they had understood that it was the duty of the judge to draw the written findings, unless he elected to request attorneys to draw them, and did not understand that they were entitled to have a judgment entered before such findings were filed. Moreover, it does not appear that the defendant was, or could have been, injured by the delay. No interest upon the demand upon which plaintiffs recovered was allowed before judgment, which judgment was entered after the motion to dismiss was denied, and not *nunc pro tunc*. The only pretense of injury is that the lien upon defendant's property was prolonged. But this was due to the default of the defendant, who might have discharged the lien by payment at any time. Furthermore, it is not perceived that the delay was not caused by the negligence of defendant equally with that of plaintiffs. As written findings were not waived, neither party was entitled to demand the entry of a judgment until such findings were prepared, and approved by the judge. Why had not the defendant an equal right with plaintiffs to urge and promote a speedy preparation of findings, if she desired so to do? It appears that both parties were dissatisfied with the conclusions of law orally announced by the court. Plaintiffs were defeated on two of the three counts of their complaint, embracing more than half of their demand; and therefore the conclusions of law announced were apparently as favorable to defendant as to the plaintiffs, and the defendant was,

equally with plaintiffs, entitled to have the judgment entered. But however this may be, since it does not appear that either party was entitled to demand the entry of judgment at any time before the motion to dismiss the action, that motion was not authorized by section 581 of the Code of Civil Procedure, and for this reason alone was properly denied.

2. It is claimed by appellant that, although it is stated in plaintiffs' recorded claim of lien that they furnished certain material actually used in the buildings, it is not therein stated that such materials were furnished "to be used" in said buildings, and for this reason that the claim of lien is void. Section 1187 of the Code of Civil Procedure prescribes what facts must be stated in the recorded claim. Among other things, it requires a statement of the claimant's "demand after deducting all just credits and offsets," but does not require a statement that the materials furnished and used were furnished "to be used" in said houses. Under section 1183, however, it has been held that a complaint for the enforcement of a lien for materials furnished must contain an averment that the materials were furnished to be used in the construction, etc.: *Patent Brick Co. v. Moore*, 75 Cal. 205, 16 Pac. 890; *Cohn v. Wright*, 89 Cal. 86, 26 Pac. 643. In this case it is alleged in the complaint that the plaintiffs "furnished . . . all the doors, window sashes, and glass, window weights and window cords, used and to be used in the said construction of, and now actually in and a part of, said two frame dwelling-houses or structures, at the special instance and request of said defendants Higgins, Davidson & Co., and that the reasonable value of the same was and is \$365.40, and that no part thereof has been paid." None of these allegations was sufficiently denied, and there was no demurrer to the complaint. The cases cited by appellant relate only to the complaint, and not to the recorded claim of lien.

3. It is contended that the recorded claim of lien does not state the amount of plaintiffs' demand "after deducting all just credits and offsets." The claim of lien states that the reasonable value of the materials furnished by plaintiffs for each house was \$182.70, no part of which had been paid, and "that the sum of \$365.40, in gold coin of the United States, is still due and owing upon said buildings, after deducting all just credits and offsets." The specific objection to this

is that the demand is measured by United States gold coin. But surely this statement of plaintiffs' demand was sufficiently definite, since United States gold coin is lawful money, by which all values of property or labor may be accurately measured in any part of the United States. Read in connection with all other parts of the claim, this statement of plaintiffs' demand is clearly sufficient. Under it the plaintiffs were entitled to prove and recover, as they did, \$365.40, in lawful money of the United States. Neither the complaint nor the judgment restricts the recovery to any particular kind of money. Nor was the property ordered to be sold for gold coin. In this connection it is objected that the claim of lien stated only the contract price of the materials. But it also stated the reasonable value thereof, and the court found such reasonable value, and the judgment is in conformity with the finding in this respect.

4. It is claimed that the judgment "is unintelligible, and incapable of being carried out by the sheriff," because it is not stated which of the defendants shall pay the amount found due the plaintiffs. A sufficient answer to this is that there is no personal judgment against any one of the defendants. The judgment, in substance, is that the plaintiffs have a valid lien upon the houses and lot for the sums found due them; that the sheriff sell the property, and from the proceeds of the sale pay plaintiffs the sums found due them, viz., \$365.49 on account of their claim, \$50 for attorneys' fees, and \$45.60 for their costs; and that he "bring the surplus money, if any, into court to abide its further order." Surely, the sheriff can execute this decree.

5. It is contended that the finding that the claim of lien was filed for record within thirty days after the buildings were completed is not justified by the evidence. The plaintiffs' claim of lien was filed for record September 17, 1890, and the court found that the buildings were completed on August 20, 1890. This finding appears to be supported by a preponderance of the conflicting evidence.

Other points made by appellant are not sufficiently plausible to merit special consideration. I think the judgment and order appealed from should be affirmed.

We concur: Belcher, C.; Britt, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

MORGAN v. RIGHETTI et al.

S. F. No. 234; June 5, 1896.

45 Pac. 260.

Partners—Action Against Several—Recovery Against One.—Under Code of Civil Procedure, section 578, declaring that judgment may be given against one of several defendants, two persons being sued on an alleged partnership debt, and it being found that they are not partners, but that the debt is the individual debt of one of them, judgment may be rendered against him.¹

APPEAL from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by E. H. Morgan against E. Righetti and another, as partners. Judgment for plaintiff against said E. Righetti and said defendant appeals. Affirmed.

Frank M. Stone and Reel B. Terry for appellant; Joseph Kirk for respondent.

HAYNES, C.—This appeal is from a judgment in favor of the plaintiff against E. Righetti, one of the defendants, upon the judgment-roll. The only question upon this appeal is whether in an action against two as partners, upon an alleged partnership liability, a recovery may be had against one of the defendants; the court finding that the defendants were not partners, but that appellant is individually liable for the indebtedness alleged in the complaint, and for which judgment was entered against appellant, E. Righetti, alone.

At common law, in an action against two or more defendants upon an alleged joint contract or liability, the judgment was required to be against all the defendants, or in favor of all. But this rule was changed by section 145 of the practice act, which was afterward adopted in haec verba as section 578 of the Code of Civil Procedure. That section reads as follows: "Judgment may be given for or against one or

¹ Cited and followed in *Hartney v. Gosling*, 10 Wyo. 364, 98 Am. St. Rep. 1005, 68 Pac. 1124, where a member of a mining partnership had borrowed money, supposedly for the firm. The court said that "in actions on contract the statute changes the common-law rule."

more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between themselves." The question here involved was decided under the practice act adversely to appellant in *Rowe v. Chandler*, 1 Cal. 167, *Lewis v. Clarkin*, 18 Cal. 399, and *People v. Frisbie*, 18 Cal. 402; and we must assume that said section of the practice act was re-enacted in the code with the construction given it in those cases; and in *Shain v. Forbes*, 82 Cal. 577, 583, 23 Pac. 198, those cases are cited and followed: See, also, *Bailey Loan Co. v. Hall*, 110 Cal. 490, 42 Pac. 962. These cases should be held conclusive of the question presented upon this appeal. We have carefully examined the cases cited by appellant, and find all of them broadly distinguishable from those we have cited above. In none of them, except *Weinreich v. Johnston*, 78 Cal. 254, 20 Pac. 556, is section 578 of the Code of Civil Procedure mentioned, and in that case it was said that section did not apply. The judgment appealed from should be affirmed.

We concur: Britt, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

QUIGGLE v. PROUTY.

S. F. No. 105; July 16, 1896.

45 Pac. 676.

Real Estate Broker—Commissions—Contract.—A real estate broker who makes a contract with a property owner can recover commissions only in accordance with such contract.

APPEAL from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Charles Quiggle against Simon Prouty. Judgment for defendant and plaintiff appeals. Affirmed.

Johnson & Johnson for appellant; Albert M. Johnson for respondent.

TEMPLE, J.—The only question involved in this appeal is whether plaintiff is entitled to recover commissions for the sale of a lot at Sacramento. Defendant placed with plaintiff, as broker, a certain lot for sale, to remain in his hands for one year, with the condition that “if a sale of said property shall be negotiated during that time by the said Chas. Quiggle, directly or indirectly, for the amount stipulated, or any less amount which I may accept, . . . I promise to pay the said Chas. Quiggle a commission of five per cent on the amount of said sale.” A broker’s contract, like any other, is governed by its terms. There is no evidence showing, or tending to show, that plaintiff negotiated a sale of the property placed in his hands. The judgment is affirmed.

We concur: McFarland, J.; Henshaw, J.

SPAULDING v. WESSON et al.*

S. F. No. 41; July 23, 1896.

45 Pac. 807.

Public Streets—Dedication—Acceptance.—It Appeared That in 1855 and 1856, under certain ordinances, a land owner had a tract subdivided into blocks and lots, with streets delineated thereon, among which was Union street, and a map was made and approved, showing such survey. In 1861 the then owner of defendant’s lot made a declaration of homestead upon it, showing it to be bounded on the north by Union street. The conveyance of said lot to defendant, and a declaration of homestead and mortgage executed by him, all described the lot in a similar manner. When Union street was graded, defendant made no objection thereto. After the grading was finished the fences were adjusted to Union street as thus laid out, the street was sewered and paved, and a street railroad was placed thereon, without objection by defendant. Held, that Union street was dedicated to public use as a street, and accepted as such.

Public Streets—Dedication—Estoppel.—The Fact That, Twelve Years after the city had caused Union street to be graded, it took steps to declare Union street a public street, and to procure the legal title thereto, cannot operate as an estoppel in pais to defeat a recovery for work done by the contractor who graded the street.

*For subsequent opinion in bank, see 115 Cal. 441, 47 Pac. 249.

APPEAL from Superior Court, City and County of San Francisco; Water H. Levy, Judge.

Action by N. W. Spaulding against J. W. Wesson and others to recover on a street assessment for grading. From a judgment in favor of plaintiff and from an order denying their motion for a new trial defendants appeal. Affirmed.

J. C. Bates for appellants; W. H. H. Hart and D. H. Whittemore for respondent.

SEARLS, C.—This is an action to recover on a street assessment for grading Union street from Larkin street to west line of Franklin street, in the city and county of San Francisco, under a contract made on the fourth day of October, 1877, with plaintiff's assignor, J. S. Dyer. Plaintiff had judgment, and defendants appeal therefrom and from an order denying their motion for a new trial. The cause has been here before, upon an appeal by the plaintiff, and the decision is reported in 84 Cal., at page 141, 24 Pac. 377.

Was Union street, from Larkin street to the west line of Franklin street, on the twenty-fifth day of June, 1877—the date of the resolution of the board of supervisors to order the grading thereof—a public street of the city and county of San Francisco? This is practically the sole question in the case. It needs no argument to demonstrate that, if that portion of said street was not in fact and law a public street, the board of supervisors was without jurisdiction to order the improvement for the payment of which the assessment involved in this action was made. This question was made an issue in the case, and was solved in favor of the plaintiff by the eighth finding of the court, in the following language: "That Union street, between Larkin and Franklin streets, originally ran through a part of lot No. 15 of the Laguna survey, as designated on the official map of said city and county, but that said portion of Union street was, prior to the twenty-fifth day of June, 1877, dedicated to public use, and was then, and now is, a public street, and not owned by the defendants." This finding is assailed by the appellants as not being supported by the evidence. The answer to the objection thus made is determinative of the case. Some minor questions were made at the trial, which need not be noticed; for, as is well said by counsel for appellants, "they resolve themselves into the question of the right of jurisdiction of

the board of supervisors to grade a projected street, only, through private property, and to attempt to assess the owners of the property unlawfully attempted to be taken, to pay for the work." Manifestly, if the alleged street was not private property, but an open, public street, objections predicated upon the theory of its being such private property fall to the ground. The finding is to the effect that the street became such by dedication prior to June 25, 1877. Dedication is the setting apart of land for the public use. To constitute a valid dedication to a public use, it is essential that the acts of the owner be of such a character as to conclude him, and that, as against the public, it be accepted by the proper local authorities, or by general public user. No formal act of dedication by the owner, or of acceptance by the public, is requisite. Any evidence which establishes the intent of the owner to dedicate, and of the public to accept such dedication, is sufficient to establish a common-law dedication to a public use. There was evidence tending to show that the lot of land owned by defendants, designated in the assessment as "Lot 18," and situate at the southwest corner of Union and Polk streets, originally constituted a part of lot 15 of the Laguna survey, conveyed in 1848, by an alcalde grant to Stephen Harris, under whom, by sundry mesne conveyances, defendants hold title. Upon the Laguna survey, so far as appears by the map, no streets were designated or laid off. There were, however, some streets and roads over the tract, and among them a road leading from the city to the Presidio, known as the "Presidio Road," which, from some of the evidence, it is to be inferred, was in part, at least, upon the same ground with Union street. W. S. Dyer, a witness for plaintiff, and the contractor who graded Union street, says the Presidio road was about twenty feet wide, and "ran down the hill in front of Mr. Wesson's [defendant's] lot." The exterior lines of defendant's lot (laguna lot No. 15) included Union street.

The evidence upon which the dedication of the street to public use is based may be summarized thus: In 1855 and 1856, under and pursuant to certain ordinances of the city and county of San Francisco, the land in question here was surveyed, and subdivided into blocks and lots, with streets delineated thereon, among which was Union street, and a

map known as the "Van Ness Map" was made and approved, showing such survey, lots and streets. The old Presidio road seems to have been abandoned soon after, and the streets, as laid out, used in lieu thereof. Some of these streets, owing to natural obstacles, could not be much used until graded and improved, and among these was a portion of Union street. In 1861 the grantor of defendants made a declaration of homestead upon the lot of defendant, showing it to be bounded on the north by Union street, and east by Polk street. The conveyance to defendant J. W. Wesson, and a declaration of homestead and mortgage executed by him, all described the lot in a similar manner; and some of them referred to the Van Ness map, and to Union and Polk streets, as delineated thereon. When Union street was graded, in 1878, by Dyer, the assignor of plaintiff, defendant J. W. Wesson made no objection thereto, but seemed to assent, and directed Dyer to take down a fence which extended into the street, and to place the material in the back yard. After the grading was finished the fences were adjusted to Union street as thus laid out, the street was sewered and paved, and a street railroad placed thereon and operated—all, so far as appears, without objection by defendants. This would seem ample to warrant the court in finding that Union street was dedicated to public use as a street, and accepted as such by the public and by the municipal authorities. On the other hand, counsel for appellants contend that as in 1891-92 the city authorities took steps to declare Union and the adjoining streets public streets, to procure the legal title thereto, and did in fact receive conveyances from defendants, and other owners of property on Union street, of their rights therein, the city is thereby estopped from saying that the title did not remain in defendants until thus conveyed. We cannot concur in this view. The action of the city, twelve years after it had caused the street to be graded by plaintiff's assignor, cannot operate as an estoppel in pais against the plaintiff here. We recommend that the judgment and order appealed from be affirmed.

We concur: Haynes, C.; Britt, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

CRAWFORD v. HARRIS.

S. F. No. 18; July 28, 1896.

45 Pac. 819.

Building Contract.—In an Action for Services for Construction of a building, defendant, after testifying that plaintiff left the job uncompleted, and that he (defendant) thereafter superintended the work himself, and that it took up his time so that he could not attend to his business (which, it appears, was that of a merchant) for two months, was asked "the value of the time he lost" while personally superintending the work. Held, that the question was objectionable, as calling, not for the reasonable compensation of a superintendent, but for the value of his time.

Building Contract.—Allowing Defendant, on Cross-examination, in an action for construction of a building which he claimed he had to complete himself, to be asked if he had not told the brickman that he would not pay him, but that if he got anything he would have to get it out of plaintiff, even if error, is harmless, defendant's answer being "No."

Jury—Misconduct.—The Presumption Being That Jurors have faithfully performed their duty, a new trial is properly denied where the affidavits charging misconduct of jurors are fully met by counter-affidavits of the jurors.

APPEAL from Superior Court, City and County of San Francisco; A. A. Sanderson, Judge.

Action by S. T. Crawford against I. Harris. Judgment for plaintiff. Defendant appeals. Affirmed.

M. J. Platscheck for appellant; W. H. Jordan for respondent.

SEARLS, C.—Action to recover \$500 for work, labor and services performed by plaintiff for defendant, and for \$353.35 as a balance due for money paid, laid out and expended by plaintiff for defendant, and to recover interest on said two several sums. Defendant denied his indebtedness to plaintiff, and, by way of cross-complaint, set out that plaintiff was indebted to him in the sum of \$1,000, for so much money by him (the said plaintiff) had and received to and for the use of defendant, and, in a separate count,

claimed a like sum of \$1,000 on an account stated; and, in a third count, defendant claimed damages in the sum of \$500 for the violation by plaintiff of a contract to superintend the erection and construction of additions and alterations to two certain buildings owned by defendant, and demanding judgment against plaintiff for \$2,500. The cause was tried by a jury, and a general verdict returned in favor of plaintiff for \$916.46, for which sum judgment was entered. The appeal is from such judgment and from an order denying a motion on behalf of defendant for a new trial.

Defendant was the owner of two buildings at the corner of Grove street and Van Ness avenue, in the city and county of San Francisco, which he desired to have remodeled, in part rebuilt, and converted into a single structure. About the month of June, 1892, as the result of sundry interviews on the subject, he entered into a verbal contract with the plaintiff, by the terms of which the latter agreed to furnish, and did furnish, plans, and was to superintend the alterations, construction, etc., all for \$500. Plaintiff took charge of the work, had the necessary grading done, moved the buildings as required by the necessities of the case, employed a foreman, ordered materials, employed, by himself or through the foreman, all needed mechanics and laborers, usually paying the mechanics, etc., and calling upon the defendant for money to reimburse himself. The work progressed until, say, the month of November, when plaintiff called upon defendant for some \$309.10 to reimburse himself for moneys alleged to have been expended in the payment of mechanics, which defendant refused to pay, averring that the bills were unjust, fraudulent, etc. Plaintiff left the building the last of November or first of December, 1892, at which time he claims it was substantially completed, except in some minor particulars not requiring his attention. There was a sharp conflict in the evidence; not only upon this last point, but also upon the general conduct of the business, and reasonableness of the expenditures incurred by plaintiff on behalf of defendant. The jury, by a general verdict in favor of plaintiff, has passed upon all the issues involved; and as there was testimony which, if believed, was sufficient to support such verdict, it can subserve no useful purpose to examine such evidence in detail, where the inevitable conclusion must be that, in the face of

the substantial conflict which characterizes the testimony, we are not authorized to substitute our views for those of the jury. The verdict must therefore stand, unless there are other and more cogent reasons for its reversal.

Two errors of law only are predicated upon the rulings of the court during the trial:

1. The defendant had testified on his own behalf to the effect that plaintiff left the job about November 24, 1892, and that thereafter he (the defendant) had superintended the work himself, and that it took up his time so that he could not attend to his business for, say, about two months. Defendant's counsel then put the following question: "What was the value of the time which you lost during the months of December, 1892, and January, 1893, during which you personally superintended the work?" Plaintiff's counsel objected upon the ground that the question was immaterial and irrelevant. The objection was sustained, and the ruling is assigned as error. We think the ruling should be upheld. It appeared, inferentially at least, that defendant was a merchant; and, as the question, in the form it was put, called, not for a reasonable compensation of a superintendent, but for the value of his time—the value of the time he lost—it was not sufficiently definite. He may well have considered his time worth \$1,000 per month, but it would not follow that a superintendent of the building in question was entitled to any such compensation. Defendant was permitted to prove, and did thereafter show, the value of his services as a superintendent of the building, viz., that such services were worth \$3.50 per day, and there was no contradiction of this testimony.

2. Plaintiff's counsel was permitted by the court, against the objection of defendant's counsel, to ask the defendant, on cross-examination, if he (the said defendant) had not told one Tarp, the brickman, that he (defendant) would not pay him a cent for his work, and if he got anything he would have to get it out of plaintiff. It is sufficient to say of this question that, while the question was within the discretion of the court, a proper one, in view of the direct examination, yet if it be conceded that it was not, as the answer was, "No, sir," no injury accrued to defendant.

One other point only remains to be noticed. It relates to alleged misconduct on the part of several of the jurors. A

number of affidavits are filed, tending to show that several of the jurors admitted to the affiants either that they were familiar with the building, the subject of the controversy, before the trial, or, as to some of them, that they visited and examined the structure pending such trial. In every instance the jurors thus impugned filed their counter-affidavits, in which they emphatically denied every fact from which any inference of misconduct could be fairly deduced. The most that can be said is that two or three of the jurors had frequently passed the building, and one of them, having a friend residing therein, had been in the building; but none of them knew anything of the character of its construction, its owner, or those who made the improvement. In short, their knowledge was only such as we all gain by the casual observance of the buildings which we pass or enter without any circumstance calling our attention thereto. Jurors will be presumed to have performed their duty faithfully and well, until the contrary is made to appear; and, as all charges of improper conduct are fully met, and negative the allegations of the charging affidavits, the motion for a new trial, so far as based upon the misconduct of the jury, as well as for other causes, was properly overruled. We recommend that the judgment and order appealed from be affirmed.

We concur: Vanc lief, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

DIETZ v. KUCKS et al.*

S. F. No. 55; July 28, 1896.

45 Pac. 832.

Lease—Effect of Assignment.—In the Absence of an Agreement to the contrary, a tenant who assigns his lease for the whole term remains liable thereon to the landlord, as surety for the assignee.

New Trial.—Where There is Any Evidence to Support a verdict, and a motion for a new trial is denied by the court, its judgment will not be reversed on appeal.

*Rehearing denied.

APPEAL from Superior Court, Alameda County; John Ellsworth, Judge.

Action by A. C. Dietz against C. H. Kucks and others. Judgment for defendants and plaintiff appeals. Affirmed.

J. E. McElrath for appellant; Geo. E. Degolia for respondents.

SEARLS, C.—Action to recover \$755 rent reserved in a lease of real estate situate and being in Oakland, Alameda county. Verdict and judgment for defendants. Plaintiff appeals from the judgment and from an order denying his motion for a new trial.

Two points only are made for reversal: 1. That there is no evidence to justify the verdict of the jury. 2. That the court erred in permitting defendant Fugel to testify to the declaration of Stillwell, an agent of plaintiff, that he, the said Stillwell, had a letter from plaintiff authorizing him to agree to an assignment of a certain lease made by plaintiff to C. H. Kucks and Hugo Fugel, partners, and by them assigned to Fugel and Wettstein, partners.

The second point urged is wholly immaterial, as there was no issue upon the question of the consent of plaintiff to the assignment. His complaint, after averring the assignment of the lease, proceeds as follows: "And that the plaintiff agreed, in writing, to the said assignment."

The facts essential to an understanding of the real question involved are that plaintiff leased certain premises to C. H. Kucks and Hugo Fugel, copartners under the name of C. H. Kucks & Co., for the term of four years from the first day of January, 1890, at the monthly rental of \$75 for the first year, and \$100 per month thereafter, payable monthly in advance. On or about September 1, 1892, Kucks sold his interest in the copartnership to A. Wettstein, who formed a copartnership with Fugel under the firm name of A. Wettstein & Co. The lease was assigned to the new firm, as before stated, with the consent of plaintiff. The new firm paid the rent reserved in the lease for some time, but finally became insolvent; and, Kucks having paid the rent up to the assignment of the lease, the real question is, Did he continue liable for the rent accruing thereafter, or was he released therefrom by operation of law, or by the

act or agreement of the parties? In the absence of some agreement to the contrary, the tenant who, as in this instance, assigns his whole term, remains liable as a surety. The assignee becomes liable directly to the lessor upon all the covenants of the lease which run with the land, and his assignor remains his surety to the lessor for the performance of such covenants: *Armstrong v. Wheeler*, 9 Cow. (N. Y.) 88; *Babcock v. Scoville*, 56 Ill. 461; *Salisbury v. Shirley*, 66 Cal. 223, 5 Pac. 104; *Greenleaf v. Allen*, 127 Mass. 248; *Wilson v. Gerhardt*, 9 Colo. 585, 13 Pac. 705. But the question remains, Was there a substitution of tenants, by consent of the parties, with an agreement that the original tenants should be released from further liability? The jury, under proper instructions from the court, found in the affirmative on this issue. The evidence in support of the verdict cannot be said to be entirely satisfactory. Still, as there was some testimony in favor of the finding of the jury, and as the court below, by refusing a motion for a new trial, evidenced its satisfaction with the verdict, we do not feel at liberty to crystallize our doubts into action by setting aside such verdict: *Meyer v. Insurance Co.*, 104 Cal. 381, 38 Pac. 82; *Mahan v. Wood*, 105 Cal. 12, 38 Pac. 507; *White v. Beer*, 105 Cal. 9, 38 Pac. 513; *Warner v. Cleaning Works*, 105 Cal. 409, 38 Pac. 960. We recommend that the judgment and order appealed from be affirmed.

We concur: Britt, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

BECKER v. FEIGENBAUM.

S. F. No. 103; July 31, 1896.

45 Pac. 837.

Appeal—Record.—Where Error is Predicated on the court's failure to give certain instructions, they must appear in the record.

Conversion—Principal and Agent—Demand.—In conversion, where plaintiff alleges that she placed in the hands of defendant, as her agent, a sum of money to be loaned on security, and defendant denies the agency, plaintiff need not allege or prove a demand on him for the money before suit.

APPEAL from Superior Court, Humboldt County; G. W. Hunter, Judge.

Action by Susan Becker against Ludwig Feigenbaum for conversion. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

J. F. Coonan and J. N. Gillette for appellant; Chamberlain & Wheeler for respondent.

BRITT, C.—It is alleged by plaintiff that she placed in the hands of defendant, as her agent, a sum of money, to be loaned on security, and that he converted a large part of it to his own use. She had a verdict and judgment for the amount thus converted. Defendant denied the agency, and resisted the action on the ground, alleged among others, that an account had been stated between the parties, by which a sum was found due to plaintiff much less than that now demanded by her. At the trial an exception was taken to the refusal of the court “to give the two instructions in reference to account stated asked for by the defendant.” It is his main contention here that such refusal was error. It is admitted that the contents of those instructions in no manner appear in the record. Counsel has suggested no means by which we may divine their import, and our own ingenuity has been unequal to the difficulty. We discover, therefore, no error in the action of the court. It is not clear that appellant means to argue that the verdict was unsustainable by the evidence. Plaintiff was indebted to defendant, and he attempted to apply part of the money in question upon such indebtedness. Of course, he had no right to do this, if he had received the money for the specific purpose alleged by plaintiff. There was direct conflict in the evidence upon the question whether he did so receive it, and the verdict of the jury is conclusive of the matter. By denying the agency, defendant rendered unnecessary allegation and proof of demand on him for the money before suit: *Parrott v. Byers*, 40 Cal. 614; *Waddell v. Swann*, 91 N. C. 108. The judgment and order denying a new trial should be affirmed.

We concur: Haynes, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

WILLIAM HILL CO. v. LAWLER.*

S. F. No. 178; July 31, 1896.

45 Pac. 847.

Probate Proceeding—Effect of Decree Dividing Property.—A decree of the superior court, in a probate proceeding, making division of the property of a testator in accordance with a petition and stipulation of the widow and residuary devisees, filed with the final account of the executors, and without notice to other parties in interest, does not affect the rights of a prior grantee of the widow, by deed conveying her interest in community property, who was not a party to the proceedings, though such decree set off the property in severalty to other devisees. Such a decree can, in any event, extend only to the succession or testamentary rights in the property.

APPEAL from Superior Court, Sonoma County; S. K. Dougherty, Judge.

Action by the William Hill Company against John Lawler. From the judgment plaintiff appeals. Affirmed.

Lyman Green, T. J. Geary and A. B. Ware for appellant; J. C. Sims for respondent.

BRITT, C.—The court below rendered judgment quieting the title of plaintiff, a corporation, to an undivided one-half interest in a certain tract of land, containing about one hundred and forty acres situated in Sonoma county. Plaintiff claims to be the sole owner of the land, and to be aggrieved by the refusal of the court to so adjudge. Patrick Lawler, father of the defendant, died on September 8, 1887, being then the owner of a large ranch which included the tract in dispute. He left a will wherein he declared his whole estate to be community property, and confirmed the legal right to his wife, Bridget Lawler, in the undivided one-half thereof, made pecuniary bequests to several persons (defendant among them), and gave the residue to James Lawler and P. H. Lawler, two of his sons. The will was regularly admitted to probate in the superior court. Pending the administration of the estate of said deceased, on December 21, 1887, said Bridget Lawler made a deed of grant to the defendant, John

*For subsequent opinion in bank, see 116 Cal. 359, 48 Pac. 323.

Lawler, of an undivided one-half interest in and to the specific parcel of land which is the subject of this suit, and the deed was recorded on the following day in the office of the recorder of said county. On June 18, 1889, the court made its decree of final distribution of said estate, reciting, among other matters, that said Bridget, James and P. H. Lawler had, by written stipulation, agreed among themselves respecting the division of the property of the estate, and that the court approved the same, and, in terms, distributing and partitioning the lands of the deceased among the three persons last named in such manner that the tract now in controversy was apportioned to said James and P. H. Lawler—no mention being made of any interest of John therein, or of the deed to him from his mother, said Bridget. The title of James and P. H. Lawler has passed by mesne conveyances to plaintiff, and thereon it founds its right in the premises.

Plaintiff argues that, in virtue of the deed from his mother, defendant took an interest in the land subject to administration; that one object of administration is the distribution of the property of the deceased among the persons entitled thereto; that the decree operated in rem, and so defendant is estopped to assert any claim to the res. Had measures been taken to ascertain the persons entitled to share in the distribution of the estate pursuant to section 1664 of the Code of Civil Procedure, or to make distribution and partition among the heirs or devisees and those claiming under them, as provided in sections 1675–1686 of the code, and the decree or order of distribution had followed thereon, then it may be that it would have the effect contended for by plaintiff; for, in either of those modes of procedure, John Lawler would have been apprised, as prescribed by the statute, of the design to determine and declare his interest, and that, as grantee of Bridget Lawler, he must, if necessary, litigate his claim. But no such course was pursued. The order of June 18, 1889, was made upon petition, accompanying the final account of the executors, and proceedings taken under sections 1634, 1665, 1666 of the Code of Civil Procedure. There was no attempt to make partition in the manner marked out by said sections 1675–1686, the decree merely conforming, it seems, to the stipulation of the widow and residuary devisees under the will. Conceding that the court had jurisdiction to allot in this manner the lands of the es-

tate in severalty, still the effect of its action must be measured by those provisions of the statute under which it proceeded. These make it conclusive as to the rights of heirs, legatees, and devisees (Code Civ. Proc., sec. 1666); that is, upon persons claiming in the capacity of heirs, legatees or devisees. Such was the construction adopted in *Chever v. Ching Hong Poy*, 82 Cal. 68, 22 Pac. 1081, where it was held, accordingly, that a conveyance made by an heir of his interest in the estate, pending administration, was not affected by a subsequent decree of distribution which ignored such deed, and purported to set over to the heir the interest he had previously conveyed. The same view of the operation of such decrees obtains generally elsewhere: *Hall v. Pierson*, 63 Conn. 338, 28 Atl. 544; *Dobberstein v. Murphy*, 44 Minn. 526, 47 N. W. 171; *Woerner on Administration*, secs. 345, 563, and numerous cases cited. "The decree of distribution is conclusive only as to the succession or testamentary rights": *In re Burdick's Estate*, 112 Cal. 387, 44 Pac. 735. John Lawler's interest in the land accrued to him neither as successor of the deceased, nor under the will. There was no voluntary submission of his claim to the court: *Estate of Vaughn*, 92 Cal. 192, 28 Pac. 221. Hence the decree of distribution did not conclude him. Plaintiff argues that the case is without the doctrine of *Chever v. Ching Hong Poy*, because there the decree set over to the heir the same interest he had already conveyed, so that the decree operated to feed the prior conveyance, while here the property described in the deed from Bridget Lawler to John was not distributed to the grantor, but to other persons. But the attempted distinction does not reach the root of the matter. That lies in the incompetence of the court, proceeding as it did in distributing the estate of Patrick Lawler, to adjudicate upon rights not necessarily involved in accomplishing the purposes of administration.

The court excluded evidence which plaintiff claims might have shown that, at the time it purchased the title of P. H. and James Lawler, the defendant was not claiming the land, but was seeking indemnity from his mother for its loss. We see no error. Defendant's deed was recorded in the proper office, and this was notice of his interest, to plaintiff at least; and there was no offer to show that plaintiff was at

all influenced by any act or omission of defendant. The judgment and order denying a new trial should be affirmed.

We concur: Haynes, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

NEALE v. BARDUE et al.

Sac. No. 108; August 3, 1896.

45 Pac. 853.

Quieting Title—Complaint.—In an Action to Quiet Title and for other relief, the complaint is sufficient to support a judgment canceling and setting aside a certificate of redemption issued to defendant, where it is alleged that the realty in controversy was never redeemed by anybody from the sale made by the sheriff to plaintiff's grantor, and that defendant was not the successor in interest of the judgment debtor, and not entitled to redeem.

APPEAL from Superior Court, Amador County.

Action by Vincent Neale against W. N. Bardue and others to quiet title and for other relief. From a judgment in favor of defendants, plaintiff appeals. Reversed.

Vincent Neale in pro. per.; Wm. J. Magee and H. V. Morehouse for respondents.

PER CURIAM.—In this case the pleader has attempted by his complaint to set out a combination of causes of action. In his prayer for judgment, he asks to have his title to certain realty quieted; that a certificate of redemption issued by the sheriff to the defendant Bardue be set aside and canceled, and the sheriff issue a deed to him as the successor in interest of the purchaser at the sale; that an injunction issue restraining the further commission of waste; and that a money judgment be decreed in the sum of \$5,000. Allegations may be found in the complaint bearing upon all these questions. A general demurrer was sustained to the pleading, upon the ground that it failed to state a cause of action, and plaintiff appeals.

It must be borne in mind that no misjoinder of causes of action or parties defendant is here involved; but the single question presents itself, Does this complaint state any cause of action, however defective, of which a court of equity should take cognizance? Without passing upon the sufficiency of other causes of action attempted to be set out, we think the complaint sufficient to support a judgment canceling and setting aside the certificate of redemption issued to defendant Bardue. There is an allegation that this realty was never redeemed by anybody from the sale made by the sheriff to plaintiff's grantor, and we find a further allegation that defendant was not the successor in interest of the judgment debtor, and not entitled to redeem. Under such circumstances, the plaintiff, standing in the shoes of the purchaser at the sale, is entitled to have the certificate of redemption issued to defendant canceled and annulled. It is claimed by defendant Bardue that plaintiff ratified the redemption by accepting the redemption money. We find nothing in the complaint showing any ratification or estoppel which could be urged against plaintiff as to any matter of redemption. For the foregoing reasons, the judgment is reversed and the cause remanded.

In re THOMPSON.

Crim. No. 170; August 4, 1896.

45 Pac. 1084.

Attorney—Proceeding to Remove—Appeal.—An appeal by the accuser in a proceeding to remove one from his office of attorney and counselor is not contemplated by the law, and will therefore be dismissed.¹

APPEAL from Superior Court, Sonoma County.

Proceeding to remove R. K. Thompson from the office of attorney and counselor at law. The proceedings were dismissed on objection to the sufficiency of the accusation, and R. B. Tappan, the accuser, appeals. Dismissed.

¹ Cited and followed in *Matter of Danford*, 157 Cal. 431, 108 Pac. 325, where this point was raised along with a number of others.

M. W. Simpson for appellant; H. C. Gesford for respondent.

PER CURIAM.—Motion to dismiss appeal granted, upon the ground that an appeal by the accuser in such a proceeding is not contemplated by law.

PEOPLE v. McDONALD.

Crim. No. 167; August 18, 1896.

45 Pac. 1005.

Robbery—Sufficiency of Evidence.—On a Trial for robbery, the testimony showed that defendant and a confederate, late at night, found the prosecuting witness intoxicated in a saloon; that, under the pretext of escorting him to his hotel, they took him along the street till they came to a blind alley; that, while one of them choked the witness, the other rifled his pockets; that they had been seen by an officer to enter the alley, and, when he came upon them, defendant was stooping over the witness, and his confederate was standing near by; that a small amount of coin was found on the confederate, and a spectacle case belonging to the witness was found near where the confederate was standing. The accomplices claimed that the witness was their friend and shipmate, and that they were taking him home, but in fact they were strangers to the witness. Held, that a verdict of guilty was sustained by the evidence.

APPEAL from Superior Court, City and County of San Francisco.

Michael McDonald was convicted of robbery and from the judgment of conviction and an order denying him a new trial he appeals. Affirmed.

Geo. Hayford for appellant; Attorney General Fitzgerald for the people.

VAN FLEET, J.—Defendant appeals from a judgment of the superior court of the city and county of San Francisco, convicting him of robbery, and from an order denying him a new trial. The single contention upon which a reversal is asked is that the verdict is not sustained by the evidence. The contention is untenable. The evidence of the

prosecution tended to show that defendant and a confederate found the prosecuting witness, Wilson, late at night, in a basement saloon, commonly designated as a "dive," near the waterfront in said city, under the influence of liquor, and offered to escort him to his hotel. He went with them, and they took him along the street until they reached a blind alley, into which they turned, and while one choked him, the other rifled his pockets, and took what money he had on his person, amounting to between one and two dollars. They were discovered in the act by an officer who had seen them enter the alley, and was induced to investigate by hearing a scuffle. When the officer approached the defendant was stooping over the prostrate form of the prosecuting witness, and his confederate was standing some six or seven feet distant. Upon being arrested and searched a small amount of coin—\$1.25—was found on the confederate; and on searching the alley after the arrest a pair of spectacles, with their case, belonging to the prosecuting witness, and which had been in his trousers pocket, was found lying near where the confederate was seen standing. When approached they stated to the officer that the prosecuting witness was their friend and shipmate, and was intoxicated, and that they were taking him home. This statement was shown to be wholly untrue, and that they had had no previous acquaintance with him. Under these circumstances, the jury were fully justified in finding the defendant guilty. It is true, the defendant denied the robbery, and gave evidence tending to put an entirely innocent face upon the transaction; but the jury were not bound to believe him, and evidently did not. The fact that none of the fruits of the robbery were found on his person was but a circumstance making in his favor, but in no way conclusive of innocence. We think the evidence amply sufficient to sustain the verdict. Judgment and order affirmed.

We concur: Harrison, J.; Garoutte, J.

BARTLETT v. MCGEE.

S. F. No. 97; August 20, 1896.

45 Pac. 1029.

Vendor and Vendee—Insufficient Title—Recovery of Money Paid.—Where a purchase contract gives the vendee thirty days for examination of title, provides for a deposit, and its return if title proves invalid, without specifying the time within which the conveyance is to be made, an unrecorded contract for sale of lands, of which the vendee has no notice, between the vendor and a third person, existing when the contract was made, and which, by mistake, included the same land, is a defect which will render the title invalid, and entitle the vendee to recover the deposit if the vendor fails within a reasonable time to remove the defect.

APPEAL from Superior Court, Alameda County; W. E. Greene, Judge.

Action by Samuel Bartlett against James McGee to recover a deposit on a contract for the purchase of land on defendant's failure to furnish a good title. From a judgment for plaintiff and an order denying a new trial defendant appeals. Affirmed.

A. A. Moore for appellant; Whitmore & Schutleff for respondent.

VANCLIEF, C.—On August 26, 1887, the defendant agreed to sell to A. Bartlett (brother of plaintiff) a certain lot of land situate in Berkeley, Alameda county. At the date of the agreement, A. Bartlett deposited with defendant \$950 as a partial payment of the purchase money, on the express condition that it should be returned to him in case defendant's title should prove invalid. The agreement and deposit were evidenced by the following written memorandum, signed by the defendant:

"\$350.

Berkeley, August 26, 1887.

"Received of A. Bartlett the sum of three hundred and fifty (\$350) dollars, being partial payment on a deposit of eleven hundred dollars in the sale of a certain block in the McGee tract, in Berkeley, bounded by Catherine street, Mc-

Gee avenue, Bancroft Way, and Allston Way, containing twenty-four lots, 50x130, the purchase price being eleven thousand dollars, and the terms as follows: Deposit, ten per cent.; one-third cash on perfection of title and surrender of deed, and the balance at seven per cent. interest, payable in one and two years; thirty days allowed to search title. If the title proves invalid, the deposit will be returned. The sale is subject to the approval of the owner, James McGee.

"C. H. McLENATHEN & CO.

"This sale is approved.

his

"JAMES X MCGEE.

mark

"August 26th.

"Received \$600 additional on above deposit.

"C. H. McLENATHEN & CO."

On April 3, 1888, A. Bartlett assigned the agreement, with all his rights thereunder, to plaintiff, who, on April 23, 1888, commenced this action to recover the deposit of \$950, on the alleged ground that defendant had failed and refused to make or tender conveyance of a valid title. The judgment was in favor of the plaintiff for the sum demanded; and defendant has appealed from the judgment, and also from an order denying his motion for a new trial.

It is alleged in the complaint that the defects in defendant's title were (1) that the land described in the agreement was subject to a recorded mortgage; and (2) that it was subject to an agreement in writing by and between defendant and one George Bates, executed August 25, 1887 (one day prior to that between defendant and Bartlett), whereby defendant agreed to sell said lot of land to Bates, and to give Bates until October 1, 1887, to examine the title. Upon the expiration of the thirty days allowed plaintiff in which to examine the title, to wit, on September 26, 1887, A. Bartlett met defendant and his counsel, at the request of the latter, for the purpose of paying the first installment of purchase money, receiving deed from defendant, and executing mortgage to defendant to secure deferred payments, as per agreement. Bartlett then produced and tendered to defendant a sufficient sum of money to make the first payment, but on the express condition that defendant should first show satisfaction of the mortgage, but said nothing on that oc-

casation about the contract of sale to Bates. Defendant then admitted the existence of the unsatisfied mortgage of record, but said he could not satisfy it so late in the day (it then being about 5 o'clock P. M.), but that he would satisfy it the next day, and would allow Bartlett to retain sufficient of the money tendered to satisfy the mortgage until defendant should satisfy it. Bartlett declined to accept this proposal, and refused to pay any part of the purchase money, except on the condition upon which he made the tender. On the next day (September 27th) defendant satisfied the mortgage, and tendered to Bartlett a deed of the land, with proper certificate of satisfaction of the mortgage, and demanded of Bartlett payment of the first installment, and that he perform his part of the agreement. Bartlett refused to take the papers thus tendered, or even to hear them read, though he was informed of their general purport. A few days thereafter, about October 3d, Mr. Bates notified Bartlett that he (Bates) held a contract with defendant, dated August 25, 1887, for the purchase of the same lot described in defendant's contract with Bartlett, and that he was about to commence an action against defendant to enforce specific performance thereof. Thereafter, on October 25, 1887, Bartlett demanded of defendant a return of said deposit of \$950, and then, for the first time, objected to defendant's title, on the ground of defendant's agreement to sell the land to Bates. Defendant then (as in his answer) denied the existence of the alleged contract with Bates, and refused to return the deposit. Thereafter, on November 11, 1887, Bates commenced an action for the specific performance of his said contract, of which the following is a copy:

"For and in consideration of the sum of one thousand dollars to me in hand paid, and the receipt of which I hereby acknowledge, I covenant and agree to sell to George Bates, of the town of Berkeley, a certain block of land situated in the town of Berkeley, county of Alameda, state of California, and bounded as follows: On the south side by Bancroft Way, on the east by Grant street, on the north by Allston Way, and on the west by McGee avenue, otherwise called 'Hamilton Street,' on the following terms: George Bates shall be allowed till October 1, 1887, to examine title; and, if the title is not perfect, then the deposit shall be immediately returned. If the title be good and valid, George

Bates shall pay on or before said first day of October the sum of two thousand six hundred and sixty-six dollars and sixty-six cents (\$2,666.66), and on the first of October, 1888, a further sum of three thousand six hundred and sixty-six dollars and sixty-seven cents (\$3,666.67), and on the first day of October, 1889, a further sum of three thousand six hundred and sixty-six dollars and sixty-seven cents (\$3,666.67); making in the aggregate the sum of ten thousand dollars in addition to the thousand dollars already paid. Deferred payments shall bear interest at the rate of seven per cent. per annum from October the first, 1887, and shall be secured by a mortgage on the property sold. On the completion of the payment to be made on October the 1st, 1887, the two thousand six hundred and sixty-six 66/100 dollars, I agree to give to said George Bates a grant, bargain, and sale deed to the whole of the block hereinbefore described, free of all liens and incumbrances, except the mortgage to be given by him to me for the balance of the purchase money. And whereas said George Bates intends to subdivide said block, and sell the subdivisions, I hereby agree to release from the effect of the mortgage any portion of the block in behalf of the purchaser of such subdivision, on the following terms: Whenever I shall receive a sum of three hundred and thirty-three dollars, I will release a lot not greater than fifty feet broad by a hundred and thirty feet long, and in the same proportion for larger or smaller lots. I also agree to open the street past the block, called 'Allston Way,' whenever said George Bates shall wish it.

his
"JAMES X MCGEE.
mark

"Witness: R. A. MORSE."

Though this contract bears no date, it is admitted that it was executed on August 25, 1887; and there is no question that the description therein plainly embraces the whole lot described in defendant's agreement with Bartlett of August 26, 1887. But it is claimed, and for all purposes of this action may be assumed, that the lot which defendant afterward agreed to sell to Bartlett was included in the description by mistake. It is further claimed by appellant that the mistake was corrected on August 26, 1887, by canceling the contract of August 25th, and executing another, which

excluded the Bartlett lot; but, on sufficient evidence, the court found that the contract of August 25th never was canceled nor reformed, and that no substitute therefor was ever executed. About five months after the commencement of Bates' action, and while it was pending, to wit, on April 23, 1888, the plaintiff commenced this action; and the pendency of Bates' action continued about seventeen months after the commencement of this action, to wit, until September 27, 1889, when it was dismissed; but on what terms or for what reason it was dismissed does not appear.

It is admitted, and I think properly, by counsel on both sides, that time of performance by either party was not of the essence of the contract, and that each party was entitled to a reasonable time within which to perform his part, provided he did not absolutely refuse to perform it before the expiration of such reasonable time; and, accordingly, I think defendant satisfied the mortgage, and removed all objection to his title on that ground, within a reasonable time; but, assuming that the Bates contract was a valid objection to his title, he was bound to cure that defect also before he would have been entitled to performance on the part of Bartlett, unless Bartlett had waived that objection by failing to urge it on September 26, 1887, when the only ground of objection urged by him was the encumbrance by mortgage. As to such waiver, it is sufficient to say that the court properly found that Bartlett did not know of the existence of the Bates contract until after the twenty-sixth day of September, 1887, nor until about the first day of October, 1887, when he was notified thereof by Bates as aforesaid. On this point the evidence was conflicting, but the preponderance thereof seems to be clearly in favor of the plaintiff. Surely, Bartlett could not have waived a defect in the title before he had notice thereof, actual or constructive. The Bates contract was not recorded.

The court found, under the heading of "Facts," that the defendant did not exercise due or reasonable diligence in clearing his title from the contract of August 25, 1887, or from the effects thereof, nor within a reasonable time make said title good or valid, as provided in his agreement with Bartlett; and in this connection it should be observed that the defendant never offered to clear his title of the cloud cast upon it by the Bates contract. In his answer, he simply

denied the existence of the Bates contract, although Bates' suit on that contract had been pending five months before he answered. The court found, as a conclusion of law, "that the making and existence of the contract of August 25, 1887, between defendant and said George Bates, rendered the title to the said land and premises invalid and imperfect, and subjected the same to reasonable doubt and litigation, . . . and not good or valid as contemplated by said agreement." I think this conclusion is fairly deducible from the facts found, and is correct: *Turner v. McDonald*, 76 Cal. 177, 9 Am. St. Rep. 189, 18 Pac. 262; *Sheehy v. Miles*, 93 Cal. 288, 28 Pac. 1046; *Peckham v. Stewart*, 97 Cal. 147, 31 Pac. 928; *Reynolds v. Borel*, 86 Cal. 538, 25 Pac. 67. To satisfy defendant's contract, the title must not only have been good in point of fact, but it must also have been free from any reasonable objection. It is not sufficient that it may be shown to be good as the result of an action instituted for the purpose of reforming defects in any deed or contract by which it appears to be defective.

In his brief, counsel for appellant contends that several of the findings are "contrary" to the evidence, but there is no specification in his statement on motion for new trial of any particular in which he claims that the findings are not justified by the evidence. The findings of fact cover twelve pages of the transcript, and are numbered from 1 to 16, some of which contain several distinct propositions. The nearest approach to a specification of any particular in which it is claimed the evidence does not justify the findings is the following: "The findings of fact numbered from 1 to 16, inclusive, are contrary to the evidence, and each and every one thereof are contrary to the evidence, in finding precisely to the contrary of the facts proven; and, for like reason, the said decision and the whole thereof is against law." Nevertheless, I have carefully examined the evidence, with the result that, in my opinion, it is sufficient to justify all the findings. The objections to the findings are based upon the assumption that the evidence showed that the cloud upon defendant's title might have been removed by correcting a mistake in the Bates contract; but conceding the mistake, and that the evidence in this case was *prima facie* sufficient to warrant a decree correcting it, at suit of defendant against Bates, yet, so far as plaintiff was concerned, the cloud re-

mained, and so obscured the title that he was not bound by his contract to accept it, and risk the result of a lawsuit with Bates. That Bates denied the mistake, and insisted upon the validity of his contract, was sufficiently evinced by the pendency of his action against defendant to enforce that contract, which action had been pending five months before this action was commenced. The only answer offered by appellant to this view of the case is a charge of collusion between plaintiff and Bates, of which there is no evidence, and which was positively denied by plaintiff and Bates.

Certain errors in law are specified by appellant in the statement on motion for new trial, and some of them are relied upon here, but none of them are sufficiently plausible to merit special consideration. They, too, are principally founded on the mistaken view of the law that it would be a sufficient defense to prove that the land for which plaintiff contracted was included in the Bates contract by mistake, and that the Bates contract ought to be reformed so as to exclude it. Unfortunately for this theory, the Bates contract could not have been reformed in this action, nor in any action to which Bates was not a party, and possibly not in any action. I think the order and judgment should be affirmed.

We concur: Belcher, C.; Britt, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order and judgment are affirmed.

OULLAHAN et al. v. BALDWIN et al.*

Sac. No. 112; August 21, 1896.

45 Pac. 1032.

Appeal—Reversal.—A Judgment cannot, on Appeal, be reversed on the evidence, and judgment ordered for appellants, when the findings of fact support the judgment.

Appeal.—Where the Evidence is Conflicting, findings of fact will not, on appeal, be disturbed.

APPEAL from Superior Court, San Joaquin County; Ansel Smith, Judge.

*Rehearing denied.

Action by Robert B. Oullahan and others against Frank T. Baldwin and others to recover brokerage commissions under contract of defendants with Gaman & Lyon, assigned to plaintiffs. From a judgment for defendants, plaintiffs appeal. Affirmed.

Mich. Mullaney, Louttit, Woods & Levinsky, Carter & Smith, and F. H. Smith for appellants; J. C. Campbell and Nicol & Orr for respondents.

GAROUTTE, J.—This action was brought by a real estate broker to recover commissions for services performed in finding a purchaser of certain real estate. Judgment went for respondents, and this appeal is prosecuted from that judgment, upon a bill of exceptions setting out the evidence. The court is now asked to reverse the judgment upon the evidence, and order a judgment for appellants; but it has no power to make such an order upon this record, for the findings of fact are against appellants, and it is only when those findings are favorable to an appellant that judgment may be ordered in his favor. Here those findings are attacked as unsupported by the evidence, and under such circumstances a new trial is all the relief that could be granted by this court, conceding the appeal to be meritorious. The case has been before the court in the past (100 Cal. 648, 35 Pac. 310); and a new trial was then ordered upon practically the same grounds relied upon by this appeal, namely, the insufficiency of the evidence to support the findings of fact. At that time the case was carefully considered from the standpoint of both law and fact, and for that reason we deem it unnecessary to now express our views in detail. In various particulars the evidence is materially different from that disclosed by the record upon the previous appeal; hence the doctrine of the law of the case cannot be invoked. And, weighing and testing this evidence as to its sufficiency, we have concluded that the findings of fact have sufficient support therein. Upon the most material issues of fact we find a sharp conflict, and as to those issues the evidence of respondents is now much more direct and explicit than that given at the previous trial.

The court made the following findings of fact: "That defendants were at all times from the making of such power of attorney to Gaman & Lyon to and including the whole of the twenty-second day of September, 1887, ready, able, and

willing to sell said lands to said Barrows on the terms and conditions stated in said power of attorney, and were ready, able, and willing to enter into a written agreement with said Barrows for the sale of said premises; that said Barrows was not ready or willing to purchase said lands on the terms and conditions set forth in said power of attorney, nor was he at any time ready or willing to pay defendants for said premises on the terms and conditions set forth in said power of attorney made by defendants to Gaman & Lyon." Again: "That defendants then requested said Barrows to enter into a written contract with them for the purchase of said premises in accordance with the terms and conditions set forth in the power of attorney by them made with said Gaman & Lyon, and then demanded payment of \$10,000 in accordance with the terms of said power of attorney; that said Barrows refused to make or enter into any agreement with defendants for the purchase of said premises." These findings of fact were supported by the evidence of Judge Budd and respondent McDougall, and, even conceding findings of fact looking in the opposite direction would not be disturbed by this court as being without support in the evidence, still such concession gives appellants no help here. The record now discloses that Dr. Barrows withdrew from all negotiations at noon upon September 22d. Hence any acts of his brokers after that time would avail nothing in proving Barrows a purchaser ready, able and willing to purchase under the terms of the contract. For the foregoing reasons the judgment is affirmed.

We concur: Van Fleet, J.; Harrison, J.

LOVE v. ANCHOR RAISIN VINEYARD CO.

S. F. No. 256; August 21, 1896.

45 Pac. 1044.

Appeal.—A Specification of Insufficiency of Evidence, "that the evidence clearly showed that the total amount due . . . was not the sum of ———, but was the sum of ———, and no larger or greater sum whatever," is insufficient.

Corporations.—Notice to One Who is Secretary, Bookkeeper and director of a corporation, that a note given by it had been assigned, is notice to the corporation.

Corporations—Declarations of President.—In an Action by the Assignee of a note given by a corporation to its president, declarations of the president as to the amount due at the time of the transfer are not admissible against the corporation.

Appeal.—An Exception, "To Which Said Charge, and the whole thereof, defendant then and there duly excepted," is not sufficiently specific.

APPEAL from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Louisa P. Love against the Anchor Raisin Vineyard Company, a corporation. Judgment for plaintiff. Defendant appeals. Affirmed.

C. F. Hanlon for appellant; Thos. A. McGowan for respondent.

SEARLS, C.—This is an action to recover upon a promissory note, made by the corporation defendant August 4, 1892, for \$6,261.29, payable one day after date to the order of John Conly, in gold coin, with interest at eight per cent per annum, and indorsed by the payee thereof to plaintiff. Plaintiff had a verdict for \$5,532.38, upon which verdict judgment was entered. Defendant appeals from the judgment, and from an order denying its motion for a new trial.

The evidence embodied in the statement on motion for a new trial shows that the note was indorsed to the plaintiff herein after maturity, viz., on October 4, 1893. Plaintiff, in her complaint, admitted the payment of certain sums of money to Conly on account of the note, and at the trial it was shown and admitted that those payments amounted to \$1,687.55. They were indorsed upon the note, and tallied with a ledger account of defendant in evidence, in which, under bills payable, the note was entered as a liability in favor of the payee, Conly, and the several payments credited to defendant in said account on account of money, etc., paid to said Conly. This is all plain and simple, and the verdict of the jury is founded on this basis. Defendant, however, produced another account, kept with Conly personally, in which he stands charged with a balance of, say, \$2,667.80, which defendant claims should have been deducted from the balance due on the note, thus reducing the verdict by that amount. We will refer hereafter to this individual account

with Conly, and to the circumstances which probably actuated the jury in concluding that it was not entitled to be treated as a payment on the note.

Upon the close of the testimony the court instructed the jury, in part, as follows: "Gentlemen of the jury: This is a question of accounting and bookkeeping. You have heard the evidence in this case, and you will have to ascertain from it, as best you can, the amount of money that is due to the plaintiff here. That the defendant owes the plaintiff is admitted by the defendant; but the question is, how much? The defendant claims that the amount claimed by the plaintiff is excessive, and that it is entitled to certain credits thereon, in consequence of demands which they had as against John Conly, who was the payee of the note transferred to the plaintiff. If you would find from the evidence that any of these items which counsel have called to your attention were designed and intended at the time to have been payments on account, or to the credit of the note, and that such items were agreed upon and determined before the date of the indorsement of the note to the plaintiff, which was October 4, 1893, they would be entitled to have them credited upon the amount due upon the note—principal and interest. If you should conclude that they are not entitled to any of these credits, then it would be your simple duty to ascertain the amount of principal and interest due, after deducting the amount of the cash payments which are contained on the back of the note." The propriety of this instruction depended upon the evidence in the case. That evidence tended to show: (1) That from the formation of the corporation up to, say, December, 1893, John Conly was president, director, general manager and a large stockholder of the defendant. (2) That during 1892 and 1893 A. S. Neal was secretary of the corporation defendant. (3) That, John Conly, the president, had advanced money to the corporation until on August 4, 1892, the corporation was indebted to him in the sum of \$6,261.29, for which sum the note in question was given, and the account balanced upon the corporation books; the note being entered in the account of bills payable, and the sums as credited on the back of the note being charged in said last-mentioned account. (4) Plaintiff, being aware that the note was overdue, and hence that any payments thereon were liable to be offset against the note, on or about the date of the

transfer to her, and before such transfer, applied, through her husband, James Love, to A. S. Neal, the secretary of the defendant, to know if the indorsements on the note constituted all the offsets thereto, and was informed that they did, except that there might be one or two small payments not indorsed; that the amount due was about \$5,000; that he and Conly had compared it recently, and found it exact. Two payments, aggregating \$250, were not then on the note, but were indorsed thereon subsequently. (5) Defendant had notice of the transfer of the note to plaintiff on the 4th or 5th of October, 1893. (6) The individual account of Conly with defendant on the 4th day of October, 1893, the date of the assignment of the note to plaintiff, showed a balance in favor of said Conly amounting to some \$1,143.86. This balance occurred in this wise: Sometime in 1892 a resolution was passed by the directors of defendant allowing Conly a salary of \$100 per month, as general manager, from the organization of the company, which salary on the thirty-first day of July, 1893, aggregated \$3,416.66, which sum was placed to his credit in the books of the company. After the transfer of the note to plaintiff, and on the fifteenth day of October, 1893, the directors of defendant, with the consent of Conly, passed a resolution rescinding the resolution to allow said Conly a salary of \$100 per month, and the sum of \$3,466.16 so standing to his credit was charged back to him; thus leaving a balance in favor of the corporation, which, together with \$420 charged him in December, 1893, on account of two assessments, aggregated \$2,119.80. The reasons given by defendant for the rescission of the resolution allowing a salary to Conly were: (1) That there was an understanding with the stockholders of defendant that all of its officers should serve without pay. (2) That the resolution allowing the salary was passed when but three directors were present. It does not appear, so far as we have discovered, of how many directors the board consisted. The minute-book of defendant was missing, and was claimed to have been lost. Under these circumstances, we are not surprised that the jury failed to credit defendant with the balance thus shown in its favor. It looked too much like an effort, after the transfer of the note, to saddle upon the plaintiff an offset not justly chargeable to her, and which defendant had not intended to so charge until after the

transfer of the note. In view of the testimony, the instruction of the court to the jury was proper.

We have thus stated in a general way the tenor of the evidence, and its sufficiency to support the verdict. In strictness, however, the specifications of the insufficiency of such evidence, as contained in the statement on motion for a new trial, are so indefinite that they might well have been disregarded. There are some eleven specifications in reference to the evidence. One will serve as a sample of all the others: "(1) That the evidence clearly showed that the total amount due by defendant to plaintiff on the date thereof was not the sum of \$5,532.38, but was the sum of \$2,520.48, and no larger or greater sum whatsoever." This form of specification is clearly insufficient: *Adams v. Helbing*, 107 Cal. 298, 40 Pac. 422; *Moore v. Moore* (Cal.), 34 Pac. 90; *Spotts v. Hanley*, 85 Cal. 165, 24 Pac. 738; *Eddelbittel v. Durrell*, 55 Cal. 279; *Hayne on New Trials*, sec. 150; *Parker v. Reay*, 76 Cal. 105, 18 Pac. 124.

The second point made by appellant for reversal is that the defendant had no notice of the transfer of the note until suit brought. The learned counsel overlooks the testimony of James Love, who testifies that he notified Neal, the secretary, bookkeeper and a director of defendant, of the transfer of the note to plaintiff on the 4th or 5th of October, 1893, immediately after the taking of the note. This was a sufficient notice: *Thomp. Corp.*, sec. 5195.

We think the court erred in admitting the declaration of Conly that there was \$5,000 due upon the note at the date of its transfer to the plaintiff. It is true that he was president of the corporation defendant, and, under ordinary circumstances, his admission would bind the defendant, made within the scope of his authority. But as payee of the note, about to make a sale of it, his interests were antagonistic to defendant, and his declarations would not be binding upon the defendant. We are of opinion, however, that this error does not call for a reversal. The note showed for itself what was due, after deducting the indorsements. Defendant's secretary testified that there was due on the note October 4, 1893, the sum of, say, \$4,603.53, without interest, and the interest up to that date was some \$517.33, thus bringing the amount up to, say, \$5,091.27. Defendant's books showed the same thing, and the only question really in dispute was

as to the right of defendant, under the circumstances hereinbefore stated, to offset the individual demand against Conly. Plaintiff's calculation showing the amount due on the note, and defendant's claim for the amount of its demand against Conly, were not only admitted in evidence without objection, but both of them were, by consent of counsel, submitted to the jury for their consideration. Under these circumstances, the error complained of was harmless: *Burnett v. Lyford*, 93 Cal. 115, 28 Pac. 855; *Silvarer v. Hansen*, 77 Cal. 584, 20 Pac. 136; *Duffy v. Duffy*, 104 Cal. 605, 38 Pac. 443.

We need not again refer to the charge given by the court, upon its own motion, to the jury, or to the strictures thereon, for the reason that the only exception thereto is as follows: "To which said charge, and the whole thereof, defendant then and there duly excepted." This was general, and not sufficiently specific to call the attention of the court to the portions thereof now assailed: *Rogers v. Mahoney*, 62 Cal. 611; *Frost v. Creamery Co.*, 102 Cal. 525, 36 Pac. 929; *Moore v. Moore (Cal.)*, 34 Pac. 91; *Cockrill v. Hall*, 76 Cal. 192, 18 Pac. 318; *Sukeforth v. Lord*, 87 Cal. 399, 25 Pac. 497. Upon the whole case, as presented, we recommend that the judgment and order appealed from be affirmed.

We concur: Haynes, C.; Britt, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

McKENZIE v. JOOST et al.*

S. F. No. 39; September 1, 1896.

45 Pac. 1056.

Appeal.—Findings of the Trial Court on Evidence fairly conflicting will not be disturbed on appeal.

APPEAL from Superior Court, City and County of San Francisco; Charles W. Slack, Judge.

*Rehearing denied.

Action by George F. McKenzie against Herman Joost and others. From a judgment allowing him only nominal damages and from an order denying a new trial plaintiff appeals. Affirmed.

Van Ness & Redman for appellant; John L. Boone for respondents.

PER CURIAM.—This is an action upon an injunction bond given in an action in the United States circuit court, in which a temporary injunction was issued, enjoining the assignors of the plaintiff herein from infringing upon a certain patent right, issued originally to one Hancock for a certain dye used in dyeing broomcorn and brooms. In the suit in the United States court the injunction was finally dissolved, and this present action is upon the bond given for said temporary injunction. The court in the case at bar gave judgment for the plaintiff, but found that he was entitled to only nominal damages, and judgment in his favor to the extent of one dollar was entered. The plaintiff appeals from the judgment, and also from an order denying his motion for a new trial.

The only point made by appellant for a reversal is that the testimony does not sustain the finding that the appellant was entitled to nominal damages only. We have examined the transcript and the briefs very fully, and it is only necessary to say that the evidence clearly brings the case within the rule that, where evidence is fairly conflicting as to an issue, the finding of the court below will not be disturbed. There was certainly evidence, and considerable evidence, tending to show that the assignors of appellant were not materially injured by the injunction, and it would serve no useful purpose for us to review the evidence here in detail. The judgment and order denying a new trial are affirmed.

MINI v. MINI.

Sac. No. 53; September 3, 1896.

45 Pac. 1044.

Divorce—Complaint—Description of Property.—An allegation in a complaint for divorce that plaintiff is possessed of "considerable property, both real and personal, situate and being in the state of California," plaintiff's separate property, is sufficient to admit of evidence of a definite description, there being no special demurrer, but a default.

APPEAL from Superior Court, Solano County; A. J. Buckles, Judge.

Action by Damiana Mini against Erminia Mini. Judgment for plaintiff. Defendant appeals. Affirmed.

H. G. W. Dinkelspiel and A. Ruef for appellant; Coghlan & Harvey for respondent.

VANCLIEF, C.—Action for divorce on the ground of adultery. After the statement of a complete cause of action for a divorce on the ground of adultery the complaint contains the following: "That the plaintiff is possessed of considerable property, both real and personal, situate and being in the said state of California, all of which is the separate property of the plaintiff, having been acquired by him before his said marriage, or acquired by him subsequent thereto, from the rents, issues, and profits thereof." The prayer of the complaint is for a divorce, "and that it be adjudged and decreed therein that the said defendant has no right, title, claim or interest in or to said property owned and possessed by plaintiff, or any part thereof." Summons having been regularly served on the defendant in the county of Solano, in which the action was brought, she failed to appear by demurrer or otherwise, and judgment for the relief prayed for was rendered against her by default. The judgment describes the separate property of the plaintiff, in which it was adjudged that the defendant had no title nor interest, with great particularity and certainty. The defendant brings this appeal from the judgment, and the only ground upon which a reversal is asked is that the complaint does not describe

the separate property of the plaintiff with sufficient certainty. Conceding that, in respect to the alleged separate property, the description thereof was not sufficiently definite or certain, the defect was waived by defendant's default and failure to demur: Code Civ. Proc., sec. 434; *Gimmy v. Gimmy*, 22 Cal. 633; *Kelly v. Murphy*, 70 Cal. 560, 12 Pac. 467. In the absence of a special demurrer, the allegation was a sufficient foundation for evidence of a definite description of the property: *Bates v. Babcock*, 95 Cal. 484, 29 Am. St. Rep. 133, 16 L. R. A. 745, 30 Pac. 605; *San Francisco v. Pennie*, 93 Cal. 468, 29 Pac. 66; *Schluter v. Harvey*, 65 Cal. 158, 3 Pac. 659; *Garner v. Marshall*, 9 Cal. 269. I think the judgment should be affirmed.

We concur: Haynes, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

KELLY et al. v. LEMBERGER et al.*

S. F. No. 160; September 15, 1896.

46 Pac. 8.

Mechanic's Lien—Reputed Owner of Premises.—A Claim of lien sufficient in form is properly admitted, as against objection that it does not correctly state the names of either the owners or reputed owners of the premises, there being at the time no evidence before the court to contradict its terms.

Mechanic's Lien—Reputed Owner.—Though One States, in his claim of lien, that a certain person is owner and reputed owner of the premises, his lien is not impaired by proof that such person was the reputed owner only.

Mechanic's Lien—Reputed Owner.—A Finding That One was the reputed owner of premises, as alleged in a claim of mechanic's lien, is not impaired by the fact that conveyances to other persons were on record.

APPEAL from Superior Court, Alameda County: F. W. Henshaw, Judge.

*Rehearing denied.

Action by Kelly and others against Lemberger and others. From a judgment for plaintiffs and an order denying a new trial defendants appeal. Affirmed.

Morrison, Stratton & Foerster for appellants; C. L. Colvin, T. F. Graber and Charles F. Hanlon for respondents.

PER CURIAM.—Four actions having been brought against the defendants to foreclose mechanics' liens upon certain land in Berkeley, they were consolidated and tried together under the above title. One of these actions was brought by H. W. Taylor, and judgment was rendered in his favor, giving him a personal judgment against Lemberger, and making the same a lien upon the land. Certain of the defendants moved for a new trial as against the claim of Taylor, and the present appeal is taken from the judgment and from the order denying their motion for a new trial.

The question presented by the appellants is the sufficiency of the claim of lien filed by Taylor, and the error relied upon by them in their motion for a new trial was the admission in evidence of this claim of lien and the insufficiency of the evidence to sustain certain findings. For the purpose of stating "the name of the owner or reputed owner, if known," of the land upon which the improvements were made, the claim of lien offered in evidence was as follows: "That Charles A. Bailey and Frank Lemberger are the names of the owners, and they are the reputed owners, of said premises, and caused said buildings and structures to be erected and constructed." The defendants objected to its introduction, upon the ground that it did not correctly state the names of either the owner or owners, or reputed owner or owners, of the premises, and excepted to the ruling of the court in admitting it in evidence. The claim of lien was, however, sufficient in form to comply with the requirements of the statute, and at the time it was offered it does not appear that there was any evidence before the court to contradict its terms. It was not error, therefore, to admit it in evidence.

From the findings of the court it appears that at the time the claim of lien was filed the appellant Bailey was the actual owner of the northerly twelve feet of the land, and that the wife of Lemberger owned the twenty-four feet adjoining, and the defendant claims the southerly thirty-six feet. In the bill of exceptions the defendants specify, as one of the par-

ticulars wherein the evidence is insufficient to justify the decision, "that part of finding 1 which finds that at the time of the filing of the lien the defendant Frank Lemberger was the owner of all the land in said finding described." This exception, however, misconceives the language of the finding. The court did not find that he was the "owner," but that he was the "reputed owner," and the appellants have not excepted to the sufficiency of the evidence to sustain this finding. The statute does not require the claimant to state the name of the actual owner, at the risk of losing his lien, but makes his statement of the name of the reputed owner as effective as that of the true owner: *Corbett v. Chambers*, 109 Cal. 178, 41 Pac. 873. The statement of the same name as owner and as reputed owner does not deprive the claimant of his lien: *Arata v. Mining Co.*, 65 Cal. 340, 4 Pac. 195. And, as he is only required to state the name of the owner or reputed owner, "if known," he may, if he does not know the name, perfect his lien without naming any owner: *West Coast Lumber Co. v. Newkirk*, 80 Cal. 275, 22 Pac. 231. In the absence of any exception to this finding, we must assume that there was ample evidence to show that Lemberger was the reputed owner of the premises, and, if so, the statement of ownership in the claim of lien was sufficient. Its sufficiency was not impaired by the further statement that Bailey was also the reputed owner. The court does not find that Bailey was not a reputed owner at the date of Taylor's contract with Lemberger, or thereafter, but is silent in reference thereto, and its finding that he was the reputed owner prior thereto is immaterial. It appears from the findings that Bailey was the actual owner of a portion of the land, and no exception is made to the findings of the court that the buildings were constructed with the knowledge and consent of the actual owners of the entire land. The fact that conveyances to these owners had been placed on record does not impair the finding that Lemberger was the reputed owner, and the dates of such record were an immaterial fact, and not an issue in the case, and it was not necessary for the court to make any finding thereof. The judgment and order are affirmed.

PEOPLE v. SANDERS.*

Crim. No. 95; September 15, 1896.

46 Pac. 153.

Criminal Law—Continuance.—Where a Year Elapsed Between the indictment of a defendant and his trial, during which both prosecution and defense searched without success for persons who were material witnesses, the court was justified in refusing a further continuance on the ground of their absence.

Forgery—Evidence.—In a Trial of a Defendant charged with having forged and uttered a draft, evidence that the person whose name purported to be signed to such draft had, prior to its being murdered by defendant, is pertinent and material, being tending to prove that the instrument was forged, and also the tendency of its false character by defendant when he uttered it; is not rendered inadmissible by the fact that it tends to prove a commission by defendant of a separate crime.

Criminal Trial—Argument of Counsel.—Where Evidence Properly admitted in a criminal trial, though it tends to prove defendant guilty of another crime than the one charged against counsel for the prosecution has the right to discuss such evidence to the jury, and to argue any theory which may legitimately be deduced therefrom.

Criminal Trial—Evidence.—Where the Prosecution, to prove a fact material to the issue that a certain person had been murdered by defendant, was permitted to introduce evidence tending to show that such person was seen riding with defendant, and that at a point farther along the road defendant was riding alone, it was prejudicial error to exclude the testimony of a witness offered by defendant to the effect that at a point still farther along the road the witness met the defendant and another riding with him, and that he was endeavoring to show that such other was the person claimed to have been murdered.

Criminal Trial—Testimony of Witnesses Shown to have been in the vicinity that they did not see a vehicle claimed by defendant to have passed along a certain road is admissible, its weight being left for the jury to determine.

Criminal Trial—Evidence.—Where the Existence of a Certain Person in regard to whom a defendant has testified is questioned by the prosecution, it may introduce testimony in rebuttal showing that efforts have been made by the officers to learn of the whereabouts of such person, and that they were unsuccessful.

*Rehearing denied.

Criminal Trial—Evidence—Genuineness of Letter.—The fact that witnesses have testified that, in their opinion, a letter offered in evidence by a defendant is genuine, while there is no direct testimony in rebuttal, does not require the court to instruct the jury that they must consider the letter as genuine, where the evidence of the prosecution tends to establish other facts which disprove its genuineness.

Forgery.—Where the Prosecution Claimed That Certain Instruments executed before the defendant as a notary were forged and fictitious, while defendant testified to their genuineness, the refusal of the court to instruct as to the presumption of genuineness arising from the defendant's certificate as notary was not erroneous, as such presumption added nothing to the positive testimony of defendant, or to the presumption of his innocence, which cast the burden of proof on the prosecution.

Forgery.—In a Prosecution for Uttering a Forged Draft, where the prosecution had introduced evidence tending to show that the purported drawer had been murdered by defendant previous to the time when the draft was written and uttered, it was proper to refuse to instruct the jury that they should not presume the death of such person, as a circumstance tending to show defendant's guilt, unless such death and defendant's knowledge of it were proven beyond a reasonable doubt, defendant's guilt not being necessarily dependent on such fact, and the jury being entitled to consider the evidence in relation to it in connection with the other evidence, though they might not regard it as established beyond a reasonable doubt.

Criminal Trial—Conduct of District Attorney.—It is improper for a prosecuting attorney to comment in argument on the failure of a defendant to testify upon any particular point.

APPEAL from Superior Court, Fresno County; J. R. Webb, Judge.

W. A. Sanders was convicted of forging and uttering a draft, and appeals. Reversed.

Frank H. Short and F. E. Cook for appellant; Attorney General Fitzgerald for the people.

HENSHAW, J.—W. A. Sanders was indicted for forging the name of William Wootton in a draft upon the Kutner-Goldstein Company for the sum of \$1,400, payable to the order of said Sanders, and for uttering and passing the said draft, knowing the same to be false and forged. From the judgment of conviction and from the order denying him a new trial he prosecutes these appeals.

The story, as told by the evidence in this case, is extraordinary, and in some respects without parallel. The defendant is a man nearly sixty years of age, who has resided in this state for more than half of his lifetime. For many years he was prominent in educational circles. He had been a teacher in the public schools in different parts of the state. He was well educated, and possessed of much learning, and more than local reputation as an agriculturist, horticulturist and botanist. He was married, and the father of children, who were growing up about him in his home in Fresno county, where he had resided for many years, and where he seems to have enjoyed, up to the time of these transactions, the universal regard and respect of his fellow-men. Wootton was an old man, past seventy years of age, possessed of valuable farming lands lying near the home of Sanders. Wootton was unmarried, and lived upon his land alone, saving for the presence of Charles Rohloff, who was employed as a farm hand. Sanders and Wootton were friends. For some time prior to the date of these occurrences, Sanders represented to Wootton and to others that one John Knausch had in contemplation the purchase of the Wootton land, designing to devote so much of it as was practicable to the culture of citrus fruits. Acting, as he represented, for Knausch, who was in San Francisco or elsewhere, Sanders made an examination of the Wootton land, platted it, showing its sources of water supply, fences and other improvements, describing the nature of its soil; in short, collating such information as a purchaser unfamiliar with the property would naturally desire to possess. This information he sent by letter to Knausch. Wootton was reluctant to sell, or at least reluctant to sell for any price which Knausch was willing to give. Sanders, by letter, suggested to Knausch that, when he should come to bargain in person with Wootton for the property, it would be well for him to bring \$20,000 in gold coin, the sight of which would tend to excite old Wootton, to stimulate his desire to sell, and enable Knausch to secure a better bargain. Knausch being unfamiliar with the Wootton land, Sanders also suggested to him that, when he came, he should not drive directly to the Wootton house, but should drive up a valley to the rear of Wootton's house, and, leaving his vehicle there, cross the steep, high hill which interposed between the valley and Wootton's home; that, by this mode of approach, he would

be enabled to take from the top of the hill a comprehensive view of the Wootton property, and thus save much time which would otherwise be spent in travel and inspection.

The matter of these transactions was in agitation for over a year. Upon the first day of February, 1894, Sanders was at Wootton's house, whither he had driven, as he says, to await the coming of Knausch, whom he was daily expecting. The hour for the noonday meal had arrived. Rohloff, the farm hand, came in from the field. The noonday meal was eaten, and Rohloff went back to his work, which was that of sowing grain, Sanders agreeing that when he should leave for home, as he proposed to do later in the afternoon, he would bring out to him upon his buckboard some sacks of seed grain. After Rohloff had gone, and when Sanders and Wootton were alone in Wootton's house, John Knausch appeared, accompanied by a man named Graves, the two having crossed on foot by the trail over the hill to the rear of Wootton's house, Knausch carrying with him a stout valise containing \$20,000 in gold coin, which would weigh about seventy-three pounds. The subject of the purchase and sale of the Wootton ranch was speedily broached. There was haggling over the terms and price, when Knausch opened his valise, and began to pour the gold upon the table. Wootton became much interested, told Knausch to keep on piling up the gold, that the table could stand it, and, with visible excitement, exclaimed, "We can trade!" The terms of the transaction were then and there agreed upon. Some papers relating to it had been brought by Knausch in anticipation of effectuating the bargain. Others were prepared upon the spot. The result was that Wootton deeded all of his property to Knausch. Knausch would have nothing to do with any of the land saving that which was fit for citrus culture, and, by an arrangement between him and Sanders, such part of the land as was unsuitable for that purpose was to be conveyed to Sanders, while Sanders, in exchange, was to convey land of his own suitable for such purposes. In addition, there was drawn up and signed by the parties a long agreement, under which the lands were to be planted with citrus-bearing trees, under the direction and management of Sanders, who was to receive a salary for his services as superintendent. Knausch was to tunnel the hills for water for irrigating purposes, and, being a practical miner, was to have charge of that work. The expenses

were to be borne equally by the four, saving that Knausch was to lend to Sanders, if necessary, moneys with which Sanders was to furnish his share of the expense. This land was to be deeded to a son of Sanders, because the son was a minor, and was to be redeeded by him to the individual owners, upon demand, after he had attained his majority. Sanders was a notary public. The acknowledgments to each and all of these papers which could have been acknowledged before him were taken before Sanders. In the matter of the deed from Knausch to Sanders, and of Sanders' deed in exchange to Knausch, because Sanders could not acknowledge a deed to himself or from himself, the plan of an intermediary dummy was suggested and adopted. Knausch deeded to one Abbott, a young man of the neighborhood, Sanders taking the acknowledgment to this deed; and he afterward, and upon Sanders' representations and explanations, deeded the same land to Sanders. Wootton took the \$20,000 in gold. For the remaining part of the purchase price, Knausch offered Wootton a check for \$25,000. Wootton refused the check, and it was understood that he should accompany Knausch and Graves either to Fresno or to Los Angeles, where the rest of the money would be paid him. The papers were left with Sanders, with directions from all the parties that, if he heard nothing from them to the contrary in the course of a few days, he was to place them on record, which in fact he did. Wootton, dazzled with the sight of the money, and exercised over the transactions of the day, showed an ever-increasing excitement, until he acted, as Sanders said, like a man dazed or in his sleep. Knausch and Graves left the house, walking back over the hill by the trail to the valley where they had left their vehicle, with the understanding that they should drive down the valley to the county road leading to Fresno, while Sanders and Wootton should proceed down the road from Wootton's house until they overtook them, when the four were to make the rest of the journey to Fresno together. Sanders harnessed his mules to his buckboard, loaded the seed grain for Rohloff, and drove down the road, accompanied by Wootton. The money was in a valise at Wootton's feet. The farm hand, Rohloff, had used up his seed grain, and was looking to see whether Sanders was coming with more, when he noticed the buckboard and its two occupants driving hurriedly down the road. When it reached the spot where San-

ders was to unload the grain, it was stopped, and, according to the testimony of Rohloff, Sanders climbed over the seat of the buckboard, holding the reins in his hand, and without dismounting from the vehicle, kicked and thrust the grain off upon the ground, some of the sacks striking a barbed-wire fence, which tore them open, and scattered their contents. The buckboard was then driven hurriedly on by Sanders to a gate, which was closed. Here Sanders dismounted, opened the gate, came back, took the reins, which he had placed upon the seat, and, holding the reins as he stood upon the ground, drove through, closed the gate, climbed into the buckboard, and drove off. Rohloff was some distance from the road, but noticed that Wootton, whose habit it was never to leave the ranch without instructing the hired man what to do in his absence, and informing him of the date of his return, upon this occasion sat with his hands in his lap, seemingly staring straight ahead. Sanders testifies that Wootton, in his nervousness and anxiety to get away, said that he did not want to see or speak to anybody, and urged Sanders to hurry up; that the mules were restive, having been without exercise for some days, and took a rapid pace of their own accord. He denies, however, that he drove through the gate, saying that Wootton took the lines himself, and drove through. A mile and a half below the point where the two were thus seen by Rohloff, two men, Wiseman and Record, plowing near the county road, saw Sanders, and recognized him, and testified that he was driving alone. This Sanders denies, insisting that, at the time, Wootton accompanied him. Some miles farther on, Sanders was again seen by an acquaintance, Gobin, who testifies that, when he passed him, Sanders was driving alone. This is admitted by Sanders in his testimony, and explained as follows: He said that he drove on with Wootton until they overtook Knausch and Graves; that Wootton, in his nervousness, became exercised over the way in which Knausch was driving the buggy, fearing a breakdown, which would prevent their arrival at Fresno, and insisted upon getting out of Sanders' buckboard, and into Knausch's vehicle, to drive for them. This he did. It was while he was so driving in Knausch's buggy that Sanders, pursuing the journey upon another road, was met and passed by the acquaintance who testified to seeing him alone. Thereafter Wootton returned to Sanders' buckboard, and road with him. While so

riding with him, Sanders, who was much elated at the outcome of the day's work, and at the prospect of receiving \$500 commission for effecting the sale, indulged in some jocose remarks to Wootton, such as, "Another milestone is passed, and your money is safe." These remarks roused the old man to great indignation. He declined to travel farther with Sanders, and insisted upon dismounting, and getting into the vehicle with Knausch and Graves. This he did, carrying the gold with him. Sanders, realizing from the old man's indignation that it was idle for him to continue the proposed journey to Fresno with them, turned off to his home. This is the last, so far as the evidence goes, that was ever seen of Wootton, even according to the testimony of Sanders. The last statement, however, is to be taken with this reservation: A witness testifies that he saw Wootton in San Francisco on or about the 10th of February, 1894. He is certain that it was Wootton, but not certain of the date.

Of Graves, Sanders himself could tell little, and no one else anything at all. He was a friend of Knausch, whom Sanders had casually met two or three times before. Upon one occasion he recognized Knausch in San Francisco, followed him into a church, and sat in the pew adjoining that occupied by Knausch and his companion, whom he afterward knew as Graves. The only thing that he remembered was that Graves upon that occasion "made a splendid, good prayer." Concerning Knausch the evidence is much fuller, though not much more satisfactory. Sanders had known him for many years. He had "grub-staked" him in the early days, when Knausch was a miner, and Sanders a school teacher. He had lost track of him until some years before, when Knausch appeared in the section of the county where Sanders resided. He was a tall, dark man, and wore an enormous mustache. Knausch informed Sanders that he had made a good deal of money, and was looking about for an investment in fruit lands. He was with Knausch once in San Diego, and spent the night with him in his room. Upon the occasion of this trip they inspected citrus lands. Knausch was solitary, retiring in deportment, a recluse by habit; seldom, if ever, stopped at hotels; had no fixed abiding place of which Sanders knew; wrote him occasionally, rarely or never directing where the replies should be addressed. Knausch was in the neighborhood of Sanders' home upon one

occasion, but would not visit his home, because he had met a woman in Oregon who had formerly worked for defendant, and this woman said that defendant's wife had given him "such a setting out it made him chill." For this reason he never wanted to see defendant's wife, and would not therefore go to defendant's house. One George Sargent testified that in 1884 or 1885 he was introduced to John Knausch by Sanders. The credibility of Sargent's evidence is impeached by the testimony of witnesses who testified that he is unworthy of belief. A. G. Sanders, son of the defendant, seventeen years of age, testified that he had seen John Knausch while his mother was east, five, six or seven years before. There is no other or further evidence of the existence or whereabouts of Knausch or of Graves, saving the testimony of Sanders, to the effect that after these occurrences, and in pursuance of a letter which he had received from Knausch, he went to Mojave, to meet Knausch, Graves and Wootton. He found neither Knausch nor Wootton, but only Graves, who represented to him that Knausch and Wootton were in the country, looking at mining property. Graves urged him to go with him and join them, but there was an undefinable something about Graves, a suspicious air and bearing, which caused Sanders to mistrust him, without defining why; and, in consequence, Sanders refused to go, and took the next train home. Letters, however, were received by Sanders and others through the United States mail, purporting to come from and to be written by Wootton. The genuineness of these is claimed by the defendant, and disputed by the prosecution.

It was not disputed that Sanders presented and obtained money upon the draft, it being claimed by Sanders that the draft was an inclosure in a registered letter received by him from Wootton, which letter was mailed at San Fernando; that he believed it to be the genuine writing of Wootton, and had no cause or reason to believe otherwise. The expert evidence is, as usual, conflicting; the witnesses for the prosecution testifying that the writing of the draft was not the handwriting of Wootton; others, for the defense, testifying to their belief in its genuineness. It was proved that the letter was, in fact, mailed at San Fernando, but by whom is not established.

The theory and argument of the prosecution is that Knausch and Graves were myths; that Wootton was done to death by

Sanders upon the first day of February, and his body concealed; that each and all of these acts were part of a pre-conceived and elaborately executed design to obtain the property, real and personal, of William Wootton. On the 19th of May, 1894, this indictment was presented against the defendant. On May 21, 1894, the defendant was arraigned. Upon March 9, 1895, defendant moved for a postponement and continuance of the trial, upon the ground of the absence of material witnesses, Knausch, Wootton and Graves. On April 8, 1895, the trial was actually commenced. There had thus elapsed between the date of the indictment and the date of the trial nearly one year, all of which time was available to defendant to procure the attendance of these witnesses. Their importance was known to the defendant and to his counsel. It appears also that the prosecuting officers during this time were making diligent search for them. The failure of both sides thus to learn the whereabouts of these witnesses, and to procure their attendance, gave reasonable cause to believe that no further postponement would secure their attendance, and the court was justified in refusing a continuance.

The draft in question was dated Los Angeles, February 5, 1894. Evidence was introduced by the prosecution, over the objection and exception of the defendant, tending to show that William Wootton, upon February 5, 1894, was dead; that upon the first day of February, 1894, he had been murdered by the defendant, Sanders. The point most strongly urged by appellant is that the court erred in admitting this evidence, in that it was evidence of a separate and distinct crime from the one charged in the indictment, and that a defendant may be charged with but one crime in a single indictment, and tried for but one offense thereunder. An indictment, it is true, must charge but one offense; and, generally speaking, evidence of a separate and distinct offense is not admissible in proof of the one charged. Thus, it will not be permitted generally to prove that a defendant committed some other, independent and distinct crime from the one charged, as the basis of inference and argument that he may have committed the particular one for which he is on trial; for, first, the defendant shall be charged with and tried for but one crime under a single indictment; second, he may and probably will be unprepared to meet with evidence the offense undisclosed by the pleadings; and, third, there being no logical connec-

tion between the two offenses, the first does not tend to elucidate or prove any material fact connected with the second, and does tend strongly to distract the minds of the jury from the issue which they are called upon to decide, and to subject the defendant to unjust suspicion and discredit: *People v. Jones*, 32 Cal. 80. But so far the rule goes, and no farther. Carefully as the law guards the rights of a defendant charged with crime, to see that he is not exposed to unwarranted aspersion or attack, it does not extend that care into indulgence. A defendant in a criminal case is treated with fairness, but not with favor. If the evidence of another crime is necessary or pertinent to the proof of the one charged, the law will not thwart justice by excluding that evidence, simply because it involves the commission of another crime: *People v. Tucker*, 104 Cal. 440, 38 Pac. 195. The general tests of the admissibility of evidence in a criminal case are: First, Is it a part of the *res gestae*? Second. If not, does it tend logically, naturally and by reasonable inference to establish any fact material for the people, or to overcome any material matter sought to be proved by the defense? If it does, then it is admissible, whether it embraces the commission of another crime or does not, whether the other crime be similar in kind or not, whether it be part of a single design or not. The commonest instance of the admission of evidence of another crime is where it becomes pertinent to prove the scienter or guilty knowledge under the particular charge. Thus, where a man is charged with passing counterfeit coin, it is allowable, in order to prove his knowledge that the coin was counterfeit, to show that upon other occasions, with knowledge of the false character of the money, he has passed similar coins. In *People v. Cunningham*, 66 Cal. 668, 4 Pac. 1144, and 6 Pac. 700, 846, in the prosecution of the defendant for the larceny of cattle, to rebut the presumption that the defendant came innocently into the possession of the cattle, it was permitted to be shown that a steer belonging to a third person, which was found in the defendant's possession with the cattle of the complaining witness, was stolen. In *People v. Lane*, 101 Cal. 514, 36 Pac. 16, where the charge was murder, the defense pleaded insanity, claiming that the deflowering of defendant's daughter by deceased had upset his reason. The people, in rebuttal, were permitted to show that the defendant had committed incest with that very daughter,

as combating the view that deceased's acts could have deranged defendant's mind.

In the case at bar it was incumbent upon the prosecution to show that the instrument purporting to be executed by William Wootton was in fact a forgery. One mode by which they undertook to establish this was by evidence that Wootton was dead before the day upon which the instrument bore date. True, this would not conclusively establish the false character of the draft, for a man might postdate such an instrument. Nevertheless, it would be evidence tending to show its false character. Again, it was a proper part of the case of the prosecution to show that the defendant uttered and passed the instrument knowing it to be forged; and if the prosecution could establish to the satisfaction of the jury that Wootton had died before the day upon which the instrument bore date, and that Sanders knew of his death, it would, unquestionably, be strong evidence tending to show that he knowingly passed a forged instrument. But the prosecution, having the undoubted right to prove these things, was not to be deprived of that right merely because the proving of the death involved evidence of the crime of murder against the defendant. The prosecution, in proving the death of Wootton, was entitled to show the manner of his death; and if, in so showing, it was made to appear that he had been foully dealt with, and had come to his end at the hands of the defendant, it was not for that reason to be excluded from the consideration of the jury. The evidence was thus not introduced to besmirch the defendant, or cast unwarranted suspicion upon him. It was necessarily introduced in proof of a material fact, which it was competent for the prosecution to show.

As to the argument of the counsel for the people, of which appellant bitterly complains, it need but be said that, with the evidence properly before the court and the jury, the prosecution was entitled to base thereon any reasonable argument or theory within the legitimate purview of that evidence, being controlled therein by the sound discretion of the court.

For the reasons we have already discussed the evidence of Rohloff, Wiseman, Record and Gobin, tending to show that on and prior to the fifth day of February, 1894, Wootton was dead, was admissible, even though it also tended to show that he was murdered by Sanders.

It will be remembered that in explanation of the fact that, at the time he was seen by the witness Gobin, he was driving alone, Sanders, in his narration of the events of the day, declares that during that portion of the journey Wootton had left the buckboard, and was riding with Knausch and Graves, over a different road. He further explains that the four met again near the town of Reedley; that Wootton once more took his place in Sanders' buckboard, and the two vehicles and their occupants proceeded along the road together. Defendant sought to introduce the evidence of a witness, Wesley Traver, an acquaintance of defendant, to prove that there and at that time Traver saw Sanders, and was able to identify him and his conveyance; to prove further that he saw another vehicle in company with that of Sanders, and that each of these vehicles contained two men; to prove by general description, if not by exact identification, that the man riding with Sanders was William Wootton; to show the time when the meeting took place, the direction in which the men were traveling; and to afford something of a description of the other two men. Under the circumstances, and under the nature of the evidence which had been brought to bear against Sanders, he should have been allowed the fullest latitude in the matter. The court, however, under objections from the prosecution, refused to admit the evidence of the witness Traver, and left such fragments of it as were admitted in an eviscerated and well-nigh unintelligible condition. Only by setting out in detail the record of the case, disclosing the futile efforts of the defense to present to the jury the evidence of this witness, could the hardship and injury which were worked to the defendant be adequately shown. The following, however, will serve as an example: The witness, having been allowed to testify that he did see Mr. Sanders, is asked: "Q. Who did you first see, Mr. Sanders or the others? Mr. Snow: We object to that as incompetent. Mr. Hinds: Irrelevant for any purpose whatsoever. Mr. Short: Q. What way were they going when you saw them? Mr. Hinds: We object on the ground it is incompetent and irrelevant for any purpose. The Court: Same ruling. Mr. Short: Q. What position were the men in when you saw them—the three men you have described? Mr. Hinds: We object on the ground it is incompetent and irrelevant for any purpose. The Court: Let the objection be sustained." Considering

the claim of the prosecution that in the mile and a half of road which lay between the place where Rohloff saw Wootton and Sanders driving together, and the place where Wiseman and Record, plowing in the field, saw Sanders driving alone, Wootton and all trace of him had disappeared as completely as though he had been whirled to another sphere, the importance to the defendant, Sanders, of evidence, even the slightest, showing or tending to show that after that time Wootton was seen in his company, and in the company presumably of the two men whom the prosecution claims to be myths, is manifest; and no discussion is needed to show the injury which the rulings worked. The language of this court in *People v. Myers*, 70 Cal. 582, 12 Pac. 719, in reviewing similar rulings of the trial court, may here be appropriately employed: "In other words, if needed in order to more clearly present the ruling: If the evidence offered would tend to show the guilt of the defendants, it was admissible; but, if to show their innocence, it was inadmissible."

Prior Nance and his wife lived in the valley up which Sanders testified that Knausch and Graves drove upon the 1st of February, and in which they tied their team when they crossed on foot over the hills to Wootton's home. Nance and his wife were allowed to testify that they saw no vehicle or men there upon that day. The evidence was admissible. The weight of it was for the jury.

In rebuttal and in disproof of the testimony of Sanders as to the existence and whereabouts of Knausch, the prosecution called as a witness J. Scott, the sheriff of the county, and proved by him that he had made search and inquiry as to the existence and whereabouts of the said Knausch. He testified that he had written letters to people in different parts of the state where Sanders had at one time or another located Knausch; that he wrote to the hotels, livery-stables and prominent men in the southern part of the state; made a trip to Los Angeles and San Bernardino; made a thorough search: "wrote north and to every locality I have heard of his being"; that within the county of Fresno he had inquired of all the old citizens, and at every hotel, livery-stable and railroad ticket office; that he had carried on these investigations all over the state for something over a year; and that during the whole time he had never found a man that had ever heard or known of John Knausch. The prosecution, as part of its case, here

undertook to prove a negative—to prove the nonexistence of John Knausch. As the evidence of the defendant left Knausch a wanderer, without fixed habitation or abode, the only evidence in rebuttal which the people could introduce was evidence that, after diligent investigation and inquiry in every place where the testimony of Sanders located Knausch as having been, no trace of him could be discovered, and to this effect was the evidence of Scott. It may at once be said that the evidence was not conclusive; that under the circumstances shown, Knausch might still have existed, and yet knowledge of his existence have escaped the inquiries of the officer; but this goes merely to the weight of the evidence, which was exclusively for the jury. Conceding, indeed, that the evidence was slight, it was in its nature the best evidence which the prosecution could bring forward, and how much or how little importance should be attached to it was for the jury alone to say.

The defense introduced in evidence a letter purporting to have accompanied the alleged forged draft, which letter made reference to the draft as an inclosure, and gave directions as to the disposition of the moneys to be obtained upon it. Four witnesses familiar with the handwriting of Wootton testified, for the defense, to their belief that the letter was written and signed by him. Against this no direct opposing evidence was offered by the people. The court refused certain instructions proposed by the defense (Nos. 51 and 52), to the general tenor and effect that the failure of the prosecution to introduce rebutting evidence made it the duty of the jury to treat and consider the letter as written and signed by Wootton. These instructions were properly refused. While there was no expert evidence upon the question of the letter in opposition to that introduced by the defense, other evidence in the case, and, indeed, all of the evidence in the case upon the part of the people, tended to show that it was impossible for the letter to have been written by Wootton. The mere fact that experts were not called in direct rebuttal of the testimony of the defense upon the subject of the letter did not leave the case of the people without any evidence tending to show its fictitious character.

It will be remembered that the notarial certificates to many of the instruments introduced in evidence were executed by

the defendant, Sanders, himself a notary public. The defendant offered, and the court refused, certain instructions (Nos. 53, 54 and 55) as to the presumption that public officers properly perform their duties; that a notary public is a public officer; and that the certificate of a notary of the acknowledgment of a deed is *prima facie* evidence of the facts stated in the certificate. These instructions are sound, as expositions of the law, but they were properly refused by the court in this case. In a civil action the notarial certificate of acknowledgment entitles a deed to be placed of record, and, when thus placed of record, the recordation carries constructive notice to the world. When offered in evidence, the effect of such a deed with its certificate is to shift the burden of proving that it is not a genuine and duly executed instrument to the side opposing. For this reason it has come to be and is truly said in the law that the notarial certificate is *prima facie* evidence of the facts therein stated, and of the character of the officer taking the acknowledgment, which character is recited therein. But in this case the burden of proof was always upon the people to show the false and fraudulent character of the instrument, and the presumption of innocence always remained with the defendant until overcome by the evidence. It was upon the prosecution to establish to the satisfaction of the jury that the instruments were not genuine. The defendant testified with positiveness that they were genuine. As against the proof required to be established by the people, and the declarations thus made by the defendant himself, the mere presumption of regularity or due execution amounted to nothing. The presumption could neither have added to nor detracted from the weight and effect of defendant's own statements.

Many of the instructions proposed by the defendant and refused by the court were sufficiently covered by those given of the court's own motion. Others, however, were not fully embraced in the instructions given. Defendant's proposed instruction No. 18, as to the reception by the jury of evidence of extrajudicial admissions or confessions, was unobjectionable in law, and should have been given. Instruction No. 40 might also well have been given. Instruction No. 46 declared to the jury that they were not to presume, as a circumstance in the case tending to show that the defendant was guilty of uttering the instrument with knowledge that it was forged,

that the said William Wootton, was dead at the time the draft was written, passed or uttered, unless the prosecution had established by the evidence in this case, to their satisfaction, and beyond a reasonable doubt, the fact that he was dead at that time, and that the defendant so knew. Some stress is laid upon the alleged error of the court in refusing this instruction. We think, however, it was properly refused. The jury were not to be debarred from considering this evidence, with all the evidence in this case, because the death of Wootton might not have been proved to their satisfaction beyond a reasonable doubt; for the death of Wootton might not have been, under the evidence and in the view of the jury necessary to be conclusively established to warrant a verdict. If, however, the jury believed from the evidence that the defendant was not guilty, unless it were proved that Wootton was dead, and that Sanders knew of his death, then, under such a state of the evidence, it would unquestionably be incumbent upon the prosecution to establish the fact of his death, and of defendant's knowledge thereof, beyond and to the exclusion of any reasonable doubt.

We note no other points presented by appellant that seems to call for a special comment, saving the objection to the argument of the district attorney. A book of blank drafts introduced in evidence was claimed by the prosecution to be in a different condition from that in which it was upon a former trial. Defendant was not interrogated upon the subject of the book. The district attorney, in argument, commented upon this, saying that, if it was in the same condition now as it had previously been, the defendant, better than anyone, could have explained and testified to that fact. Defendant's failure to testify upon any particular point should not be commented on in argument: *People v. McGungill*, 41 Cal. 429; *State v. Fairlamb*, 121 Mo. 137, 25 S. W. 895.

For the foregoing reasons, the judgment and order are reversed and the cause remanded for a new trial.

We concur: McFarland, J.; Temple, J.

CURRY v. HOLLAND.*

No. 15,744; September 16, 1896.

46 Pac. 4.

Work and Labor—Conflicting Evidence—Appeal.—Where the only point in dispute on an appeal relates to the value of the services sued for, on which the evidence is conflicting, the verdict of the jury will not be disturbed.

APPEAL from Superior Court, City and County of San Francisco; A. A. Sanderson, Judge.

Action by Edward J. Curry against Patrick Holland. Judgment for plaintiff, and from an order denying a new trial defendant appeals. Affirmed.

M. E. Babb and A. F. Low for appellant; Sullivan & Sullivan for respondent.

PER CURIAM.—Action to recover the reasonable value of work and labor performed by plaintiff for the defendant at the request of the latter, between September 14, 1888, and September 14, 1889, in cutting and fitting clothing in the tailoring establishment of the defendant, in the city of San Francisco. The plaintiff alleged in his complaint that his services thus rendered were reasonably worth the sum of \$3,400, that he had been paid on account thereof only the sum of \$2,260, and prayed judgment for the balance of \$1,140. The defendant denied that the reasonable value of plaintiff's services exceeded \$2,260, which had been paid him. The cause was tried by a jury, whose verdict was in favor of plaintiff for \$1,140, the sum demanded. The defendant made a motion for a new trial, which was denied, and his appeal is from the order denying his motion for a new trial.

The only point in dispute relates to the value of plaintiff's services, as to which appellant contends that the verdict is excessive and not justified by the evidence. Upon this issue, however, there was a substantial conflict of evidence, and for this reason the verdict of the jury should not be disturbed. The order denying a new trial is affirmed.

*Rehearing denied.

GOODRICH v. LOUPE et al.

S. F. No. 417; September 16, 1896.

46 Pac. 77.

Default Judgment—Setting Aside—Appeal.—An order setting aside a judgment by default is largely discretionary, and, where moved for at once and granted upon terms, will not be disturbed on appeal, though the showing made is not strong.

APPEAL from Superior Court, Santa Clara County; John Reynolds, Judge.

Action by one Goodrich against one Loupe and others. Plaintiff appeals from an order setting aside a default judgment in his favor. Affirmed.

Will A. Coulter and C. D. Wright for appellant; John J. Roche for respondents.

PER CURIAM.—This is an appeal from an order setting aside a default judgment. The motion to set aside was based upon the grounds of inadvertence and excusable neglect. The showing made by affidavit is very weak, and, if the lower court had denied the motion to vacate, its action upon appeal probably would not have been disturbed. But in matters of this kind the superior court is vested with large discretion; and in view of the fact that the motion to set aside was made promptly, and also in view of the further fact that the motion was granted upon terms, when taken into consideration with the showing made by affidavit, we have concluded to affirm the action of the trial court. The order appealed from is affirmed.

FIRST NAT. BANK OF FT. COLLINS v. HUGHES.

Sac. No. 94; September 16, 1896.

46 Pac. 272.

Note—Title of Plaintiff.—A Finding That Plaintiff Bank was not the owner of the note sued on, which was in evidence, indorsed by the payee, cannot be sustained, as against the positive testimony of plaintiff's president and cashier that the note was bought by plaintiff of the payee before maturity, though plaintiff, on sending the note after maturity to another bank for collection, sent a new note to be executed by defendant, extending the credit for six months, which was made payable to the payee of the first note—plaintiff's president testifying that it was customary to have renewal notes so executed, and then indorsed by the payee—and though the cashier of another bank testified that it was customary to have notes discounted by a bank marked differently from the one in question.

Note—Who may Sue on.—Transfer of a Note to a Bank for Collection gives it such ownership thereof that it can sue the maker thereon.¹

Sale—Warranty.—A Bill of Sale of a Stallion merely guaranteeing him to be a breeder excludes a guaranty of his being pure bred.²

Sale—Warranty of Stallion.—A Promise by the Seller, in a bill of sale of a stallion guaranteeing him to be a breeder, that, on satisfactory proof that he is not a breeder, the seller will give another in exchange for him, on his being delivered at a certain place, limits the buyer's remedy, in the absence of a refusal of the seller to comply with such agreement.

Sale—Rescission for Breach of Warranty.—After Consummation of a sale, the buyer cannot rescind it for breach of a warranty not

¹ Cited with approval in *Routh v. Kostachek*, 15 Okl. 238, 81 Pac. 430, where an agent bought a note with his principal's money and had it indorsed to himself. Suit was held properly brought in the agent's name.

² Cited with approval in *Kullman, Salz & Co. v. Sugar Apparatus Mfg. Co.*, 153 Cal. 732, 96 Pac. 371, on a sale of a machine, where the court said that a complete written contract having been made, "oral representations or warranties and implied warranties and all oral negotiations are merged in" it, "and by its terms the parties must be bound."

intended to operate as a condition, though a note for the balance of purchase money has not been paid, his remedy being for damages suffered from the breach.*

APPEAL from Superior Court, Stanislaus County; William O. Minor, Judge.

Action by the First National Bank of Fort Collins against George T. Hughes. From a judgment for defendant and an order denying a new trial plaintiff appeals. Reversed.

Needham & Dennett for appellant; L. J. Maddux for respondent.

SEARLS, C.—This is an action to recover upon a promissory note dated May 25, 1891, made by defendant George T. Hughes, for \$700, payable to the order of Jesse Harris, three years after date, at the First National Bank, Fort Collins, Colorado, with interest, etc. Plaintiff sues as the indorsee and owner of the note. Defendant's amended answer denies plaintiff's ownership of the note, or that it was ever the lawful owner thereof, or that it was ever, for a valuable consideration or at all, assigned to plaintiff, or that he is indebted to plaintiff on account thereof. Further answering, defendant avers that, at the date of the note, he purchased from the payee thereof, Jesse Harris, a "Cleveland bay stallion," for \$2,100, for which he gave three promissory notes, of \$700 each, payable in one, two and three years—the note in suit being the last thereof. The answer then proceeds to aver that Harris, as an inducement to the purchase of said horse, represented that the horse was a pure-bred Cleveland bay horse, and would transmit his color and general characteristics to all his progeny; that at the end of two years the horse proved to be not a pure Cleveland bay, and his progeny was of mixed and off colors, and but few of them were Cleveland bays; that the representations of Harris were false and fraudulent, and made with a view to misleading defendant, and inducing him to purchase and give the three notes; that before the development of the progeny defendant had paid the first two notes, amounting to \$1,500, which was in excess

* Cited and approved in *Spaulding v. Pitts*, 26 S. D. 85, 127 N. W. 612, stating that in case of sale with warranty and a breach thereof, the buyer may keep the property and sue for the breach, or plead the latter in reduction when himself sued for the price.

of the value of the horse; that before this action was brought he tendered the horse to Harris, and demanded the note here in suit, etc.; that the consideration of the note has failed, etc. He further avers, on information and belief, that the note was not transferred to plaintiff for a valuable consideration, "but only for the purpose of collection," and was made after maturity thereof.

Among the errors assigned by the appellant, an important one is that a special finding of the jury is unsupported by and is contrary to the evidence. The court submitted to the jury the following interrogatory: "Interrogatory No. 1. Was the plaintiff the owner of the note in suit at the time of the commencement of this action?" To which the jury returned for answer, "No." Plaintiff, on its part, for the purpose of establishing its case and its ownership of the note in question, (1) introduced the note in suit, duly indorsed by Jesse Harris, the payee thereof. (2) It introduced the depositions of three witnesses, viz., of Franklin P. Avery, president, G. A. Webb, cashier, and L. C. Morse, assistant cashier, of the plaintiff bank, all of whom testified clearly and positively that the bank was the absolute owner, by purchase for a valuable consideration before maturity, of the note in question. Their testimony does not differ, and we quote that of Morse as a sample of the whole. It is as follows: "I am a resident of Fort Collins, Colorado. Am assistant cashier of the First National Bank of Fort Collins. I was in the bank at the time of the transfer of the note in question, and examined the books again to-day. The note was transferred to the First National Bank of Fort Collins before it became due, for a valuable consideration. The transfer to the bank was made March 21, 1894 (it fell due May 25, 1894). \$739.25 was the price paid for the note. We bought the note for its present worth at that time, and gave Mr. Harris the money for it. The note was not left by Mr. Harris with us for collection or as a collateral security." Defendant also offered in evidence a letter from Jesse Harris to said defendant, dated before the maturity of the note, viz., May 7, 1894, in which he says "that the First National Bank of this place [Fort Collins] owns your note coming due this month."

As opposed to this positive evidence, two circumstances were relied upon by defendant: First. After the note fell due

plaintiff sent it to the First National Bank of Modesto on two occasions for collection, and on the last occasion sent a new note, to be executed by defendant, extending the credit for six months. This new note was, like the first, made payable to Jesse Harris. This was explained by the officers of plaintiff as their usual custom in such cases. Avery, the president of the plaintiff, in his testimony said: "The name of Jesse Harris, probably, was placed upon the new note. That was our customary way of taking renewals of notes of this class. We desired the note in the same form as the original, with Jesse Harris indorsing it, which at that time we considered good." The other circumstance is this: Each time when the note was sent out by plaintiff, it was marked for collection as follows: "First Nat'l Bank, Ft. Collins, Col." "Col. No. 21,755; also, 22,574." Defendant sought to prove by J. E. Ward, cashier of the First National Bank of Modesto, that these marks indicated that plaintiff held the note for collection simply, and not as an owner. The witness, however, did not so testify. He did testify that it showed the note had gone through plaintiff's collection register, and said it was customary, where bills were discounted, to mark them "D. B.," but, when pressed to say that it indicated that it was only turned over for collection, replied that "he could not say." The following question was put to the witness: "Q. Don't the collection number mean that it is in their hands for collection?" "A. Yes, sir; or it may be transferred from one department of the bank to another. You can't tell as to that."

It is matter of common knowledge with those who have transacted business with and for banks that many of them divide their business into departments, as, for instance, exchange department, collection department, discount department, etc. Under such circumstances it is quite natural that the collection department, receiving a security for collection, should treat it simply as a collection, to be accounted for to the bank or department from which it came. These considerations tend to weaken any inference or deduction of non-ownership by the bank from the circumstance in evidence. Again, the answer of defendant avers, in substance, that the note was transferred to plaintiff for collection. This gave such an ownership in the note to the plaintiff as entitled it to maintain the action. True, if indorsed without considera-

tion or subsequent to maturity, as is averred, it would be subject to any valid defense of the plaintiff, but a recovery could not be defeated for want of ownership in plaintiff, alone. Under these circumstances, we are of opinion the evidence militating against the showing of ownership by plaintiff of the note in suit did not raise a substantial conflict, and is wholly insufficient to support the special finding of the jury. For the foregoing reasons a new trial should be had.

There is further matter involved in the case, which, in view of another trial, calls for some notice. As hereinbefore stated, the defendant pleaded fraud on the part of Harris, whereby he was induced to purchase the stallion and make the three promissory notes. The answer in this respect is not as full and explicit in its statement as is desirable. At the trial defendant testified as to certain representations made to him, prior to the purchase of the horse, touching his breed, and that his colts, instead of being all bay in color, were not over one-fourth of them of that color, etc., when it transpired that defendant had received a written warranty upon the purchase of the horse, which warranty was without objection admitted in evidence. It is as follows:

“Original.—No. 252.

“Office of Jesse Harris,

“Importer of English, French, and Scotch Horses.

“Ft. Collins, Colo., May 25, 1891.

“This is to certify that I have this 25th day of May, 1891, sold and delivered to George T. Hughes the imported Stallion Emancipation, No. 209; recorded in Volume I. of the American C. B. Stud Book. I hereby guaranty the above-named horse to be a breeder, and if, after two seasons' use, I have satisfactory proof that he is not a foal getter, I will, upon delivery of said horse at my establishment in Ft. Collins, Colo., give in exchange for him a horse of same breed, of equal value and merit, provided the above-named horse be returned to me in as sound and in as good condition as when purchased from me. Agents not allowed to deviate from this contract.

“JESSE HARRIS.

“I hereby accept conditions of above guaranty.

“GEORGE T. HUGHES.”

Upon the back of the bill of sale was the following further stipulation:

“Modesto, Cal., May 25, 1891.

“I hereby agree that if the horse Emancipation (No. 209), A. C. B. S. Book, is in as good and sound condition as when purchased from me, I will exchange for him another horse of same breed and value at any time I may be through this state within two years with other stock for sale, but I do not agree to make a special shipment of one horse to this state for that purpose.

“[Signed] JESSE HARRIS.”

Printed letter-heads from Harris were also introduced in evidence, showing him to be an importer and breeder of “Cleveland bay” and other breeds of horses, and of the former it is said: “The Cleveland bays are the purest breed and most prepotent coach horses in the world. . . . No other breed of horses transmits its color, form, and general characteristics to its progeny in such a marked degree as the Cleveland bay.”

These letters were written after the sale to defendant, and could not have entered into the warranty. The warranty must be presumed to be a crystallization of the meaning of the several oral declarations which preceded it. A glance at that instrument shows that the parties settled upon the mode and measure of relief in case the animal sold did not fill the requirements of the warranty. This was that, at the end of two years, if he failed, Harris was, upon his delivery in sound condition at Fort Collins, Colorado, to exchange him for another horse of the same breed, of equal value and merit; or, as in the agreement of the same date indorsed on the warranty, to exchange him in like manner, at any time within two years, when Harris might be in California with other stock for sale, but he was not to make a special shipment of one horse for that purpose. There was no attempt made by defendant to prove that he ever returned the horse to Fort Collins, or offered to do so, for exchange, or that Harris was in the state with horses, and refused to make an exchange. The fact is, as appears by the testimony of defendant, that he never offered to cancel the contract until October, 1894, when he proposed to deliver the horse to the agent of Harris upon the surrender of the note in suit, and that the agent then proposed to him to “ship the horse to

Fort Collins, Colorado, and we will ship you a horse out here that we know to be a thoroughbred and true breeder." This was substantially what Harris had agreed in his warranty to do. "The breach of a warranty entitles the buyer to rescind an agreement for sale, but not an executed sale, unless the warranty was intended by the parties to operate as a condition": Civ. Code, sec. 1786. The sale in this case had been consummated for years, and was not open to rescission. If there was a breach of the warranty, and defendant suffered damages thereby, he is, upon proper pleadings, entitled to deduct the same from plaintiff's recovery, upon it appearing that plaintiff is not an innocent purchaser for value before maturity.

The judgment and order appealed from should be reversed and a new trial ordered, with leave to defendant to amend his answer if he shall be so advised.

We concur: Belcher, C.; Haynes, C.

PER CURIAM.—For reasons given in the foregoing opinion the judgment and order appealed from are reversed and a new trial ordered, with leave to defendant to amend his answer if he shall be so advised.

SLOSSON v. GLOSSER et al.

S. F. No. 422; September 29, 1896.

46 Pac. 276.

Attachment.—An Order Refusing to Dissolve an attachment will not be reversed on appeal where the evidence is conflicting.

Attachment—Debt Secured by Bond.—Under the Provision of Code of Civil Procedure, section 538, excluding from the debts on which an attachment may be obtained those secured "by any mortgage or lien upon real or personal property, or any pledge of personal property," the fact that a debt is secured by a bond executed by the debtor with sureties will not defeat an attachment thereon.

APPEAL from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Edw. P. Slosson against George W. Glosser and others. Defendants appeal from an order refusing to dissolve an attachment. Affirmed.

Wal. J. Tuska for appellants; Rhodes & Rhodes for respondent.

PER CURIAM.—Appeal from an order refusing to vacate and dissolve an attachment. The order must be affirmed. The showing made by plaintiff on the motion directly contradicted that of the moving defendant as to the purposes for which the bicycle installment contracts were assigned to plaintiff; the defendant claiming that they were so assigned as security for the debt sued on, and plaintiff's affidavit setting up that they were not taken for that purpose, but that he was simply to take the contracts and collect the installments due on them for defendants, and expressly declined to take them for any other purpose. The evidence was thus substantially conflicting, and it is therefore unnecessary to inquire whether, had the contracts been assigned to secure the debt, they would have constituted such security as would preclude plaintiff from the remedy of attachment, since, upon well-established principles, the finding of the lower court is conclusive, and the order cannot be disturbed: *Barbieri v. Ramelli*, 84 Cal. 174, 24 Pac. 113.

The further question whether plaintiff held the bond for \$1,000 claimed to have been executed by Glosser and two sureties to plaintiff's assignor as security for the defendants' indebtedness is wholly immaterial, since such security does not prevent the right of attachment. The requirement is that the debt shall not be secured "by any mortgage or lien upon real or personal property, or any pledge of personal property": Code Civ. Proc., sec. 538. Order affirmed.

POTTKAMP v. BUSS et al.

S. F. No. 183; September 26, 1896.

46 Pac. 169.

Pleading—Amended Complaint After Remittitur.—Where the supreme court held it error to refuse permission to plaintiff to file his amended complaint, and remanded the cause "for a new trial, with leave to the parties to amend the pleadings," plaintiff may, after the remittitur goes down, file, without leave of the trial court, an amended complaint other than the one offered on the first trial.

Pleading—Amended Complaint.—The Point That It cannot be Ascertained how the cause of action in an amended complaint is connected with the cause of action stated in the original complaint is not reached by demurrer to the amended complaint on the ground that it is "ambiguous, unintelligible, and uncertain"; it not appearing in the amended complaint what was alleged in the original.

Witness—Question Calling for Legal Effect of Instrument.—The issue being whether an instrument, in terms an absolute conveyance, was accepted as such, as contended by plaintiff, or as security, as contended by defendant, a question asked plaintiff, "State what you believed that document to be at the time it was delivered to you," will not be held to ask an opinion as to its legal effect.

Witness—Question Calling for Conclusion of Law.—Where one has testified on cross-examination as to the time when, and the circumstances under which, he signed an instrument, a further question on cross-examination, "Do you swear that you signed that instrument as a witness?" calls for a conclusion of law based on the facts stated by him.

APPEAL from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Adolph Pottkamp against John G. Buss and others. Judgment for plaintiff, and defendants appeal Affirmed.

F. J. Castelhun and H. C. Firebaugh for appellants; A. B. Hunt and A. D. Lemon for respondent.

PER CURIAM.—This action was commenced June 16, 1888, and defendants answered and filed a cross-complaint, upon which issue was also taken. During the trial, plaintiff asked and obtained leave to file an amended complaint; but

when it was prepared the court refused to permit it to be filed, upon the ground that it did not conform to the proofs. Judgment went against the plaintiff, and his motion for a new trial was denied. On December 8, 1892, this court reversed the judgment and order upon the ground that the court below erred in refusing to permit the plaintiff to file his amended complaint, and remanded the cause "for a new trial, with leave to the parties to amend their pleadings": 3 Cal. Unrep. 694, 31 Pac. 1121. On February 21, 1893, the plaintiff, without motion therefor, or leave given by the court below, filed an amended complaint, and defendants moved to strike it from the files. That motion was denied, and defendants excepted.

Appellants contend that an application to amend is never general, but always specific, and, as plaintiff did not file the amended complaint which he had asked leave to file during the first trial, that he had no right to file a different amended complaint without leave of the court below. The leave given in this court was not special, to file a particular complaint, but the order was general, permitting both parties to amend. It is admitted that the remittitur had gone down. It thereupon became a record in the lower court, and had at least all the force of an order made by that court: Code Civ. Proc., secs. 53, 958. The motion was properly denied.

2. Defendants demurred to said amended complaint, and contended that the court erred in overruling their demurrer. Eleven grounds of demurrer were specified. Of these, the first was for want of sufficient facts; the second, third, fourth and fifth presented grounds only available upon motion to strike from the files, or to require different causes of action to be separately stated; the sixth, that said amended complaint "is ambiguous, unintelligible, and uncertain"; and the remaining five specified sections of the code under which the cause of action was alleged to be barred by the statute of limitations. The purposes of the action, as disclosed by said amended complaint, were to reform a deed executed by defendant Buss to the plaintiff; to quiet plaintiff's title under the same, as against the defendants; to require defendants to account for rents received by them from the premises after plaintiff's exclusion therefrom; and for general relief. The complaint covers twelve printed pages of the transcript, and is somewhat dif-

ficult of satisfactory condensation. It shows, in substance, that on March 31, 1887, the plaintiff was, and for a long time had been, in the employ of defendant Buss, as foreman of his bakery; that Buss was then in financial difficulties; that prior to that time the plaintiff had loaned him considerable sums of money, and, with a loan made at that date, he was indebted to the plaintiff in the sum of \$2,500; that Buss proposed to convey to plaintiff a lot at the southeast corner of Dolores and Seventeenth streets (subject to a prior mortgage thereon), together with certain personal property; that plaintiff, desiring to have said indebtedness fully paid and satisfied, agreed to accept said conveyance; that Buss then prepared and executed an instrument, of which the following is a copy:

“John G. Buss to Adolph Pottkamp.

“Know all men by these presents, that I, John G. Buss, of the city and county of San Francisco, for and in consideration of \$2,500, the receipt whereof is hereby acknowledged, do hereby sell, convey, and transfer to Adolph Pottkamp that certain store, and all the stock therein, and the bakery attached thereto, and the tools and fixtures of said bakery, situate at the southeast corner of Seventeenth and Dolores streets, in the city and county of San Francisco, state of California; also eight horses, three wagons, and one buggy, with the harness belonging to all and each of said wagons and buggy. In witness whereof, I have hereunto set my hand and seal this 31st day of March, 1887.

“[L. S.]

JOHN G. BUSS.

“Witness: JOHN KELLY.”

The complaint further alleged that said instrument was duly acknowledged on June 30, 1887, and recorded July 1, 1887; that said instrument was delivered to plaintiff on the day of its date, with the statement, “Here is the deed to this lot and premises, and to this storehouse and bakery,” and, after pointing out said personal property, defendant Buss said: “All this property is yours. Now take possession of it.” It was further alleged that, during all the time plaintiff had been in defendant’s employ, the most friendly and confidential relations existed between them; that plaintiff, believing, trusting and relying upon defendant’s representations as true, accepted said instrument, without reading or

examining the same, or having it read to him, as a good and sufficient deed to said premises, took possession of said premises and of the personal property, and held possession of the same until July 8, 1887, when the defendants Buss, Ludeman and Pfeiffer, with intent to cheat and defraud him out of his money and out of his said premises, without right, and by force, put the plaintiff out, and by force entered, and unlawfully, and against his will, withheld said premises from his possession; that on July 2d Buss filed a declaration of homestead on said premises, and on July 8th filed a voluntary petition in insolvency and was adjudged an insolvent debtor; that on August 11, 1887, Buss executed a lease of said premises to defendant Pfeiffer for the term of five years, and on the same day assigned said lease to defendant Ludeman, and on August 31, 1888, conveyed said premises to Ludeman, and that Pfeiffer and Ludeman took with knowledge of the rights and interests of plaintiff, and that any claim made by them, or either of them, is subject and subordinate to the title of plaintiff; and that defendants have received in rents from said premises \$5,000.

Most, if not all, these acts of defendant Buss, and also of his confederates, are alleged to have been done with intent to defraud the plaintiff, and tend to some confusion and obscurity in the statement of plaintiff's cause of action, but that a cause of action is stated we have no doubt. It is true, defendants demur also upon the ground that the complaint is "ambiguous, unintelligible and uncertain," and thereunder specify three particulars. The first is that it cannot be ascertained how the cause of action in the amended complaint is connected with the cause of action stated in the original complaint. It does not appear in the amended complaint what was alleged in the original, and this point was therefore not reached by demurrer. The second specification is not well taken. It is argued that it is not charged, nor attempted to be charged, that Pfeiffer and Ludeman are "in any way responsible for the error, if there was any error, in the writing sought to be reformed," and that it is not attempted to be shown how the error therein ought to affect them. But it does clearly appear that their interests were acquired after the recording of the alleged conveyance to the plaintiff, and therefore with notice of whatever right or title he had thereunder; and this remark also answers ap-

pellants' third specification under this ground of demurrer. When the pleader alleges facts which in law constitute notice, it is equivalent to an allegation that the parties affected had notice. As to the demurrers alleging the bar of the statutes of limitation, the original complaint was to quiet title, and alleged that Pfeiffer and Ludeman claimed an interest, that it was without right, etc., but did not seek the recovery of rents and profits. The lease to Pfeiffer was made August 11, 1887, and Ludeman received the rents thereunder from that date. The last amended complaint was filed February 20, 1893, and therefore within five years from the date of the lease, and was not barred": See Code Civ. Proc., sec. 336, subd. 2.

3. Plaintiff, while testifying in his own behalf, was asked by his counsel: "State what you believed that document [referring to the instrument set out in the complaint] to be, at the time it was delivered to you." Defendants' objection was overruled. The defendants claimed that the instrument in question was a bill of sale given as security. The plaintiff claimed that it was a deed of conveyance, and the question was not, as counsel seemed to think, what plaintiff "thought it was," or his opinion as to its legal effect, but what he believed it to be when he accepted it; in other words, whether he believed it to be what defendant Buss represented it to be. It was held upon the former appeal that the language of the instrument "clearly expresses the intention to convey the building in which the goods were stored, and the attachment thereto in which the business of baking was carried on"; and the question in issue upon the second trial was not whether its language expressed an intention to convey the real estate, but whether it was accepted as such, or whether it was accepted or believed to be merely a bill of sale of the personal property as security. We see no error in the ruling. Plaintiff's witness Leon was asked upon cross-examination, "Do you swear that you signed that instrument as a witness?" The objection that it was not cross-examination was properly sustained. He had not been interrogated in chief on that subject, and besides he had testified upon cross-examination as to the time when, and the circumstances under which, he had signed it, and under these circumstances the question called

for a conclusion of law based upon the facts stated by the witness.

It is insisted that the court erred in denying defendants' motion for a nonsuit. Twenty-nine grounds were specified as the basis of the motion. We cannot consider these in detail, and can only say that the ruling was right. Such motions are not determined by a consideration of the weight of the evidence further than is necessary to ascertain whether it would justify a finding upon each material issue essential to the plaintiff's case if the defendants should fail or refuse to introduce any evidence.

Most of the findings of the court are excepted to on the ground that they are not justified by the evidence. To notice all of these specifications in detail would require more space than can be devoted to this opinion. The evidence upon most points is conflicting, but it may be said, generally, that there is evidence sufficient to justify all of the findings upon the material issues involved in the case, namely, the indebtedness of Buss to the plaintiff, the execution and delivery of the instrument under which the plaintiff claims and the fact that it was intended and accepted as a conveyance of the real as well as the personal property, and not merely as a security, and that Pfeiffer and Ludeman took their interests with notice of the plaintiff's title. The conveyance from Buss to the plaintiff was recorded July 1, 1887, and on the next day Buss placed of record a declaration of homestead on the premises, and on the 8th of July filed his petition in insolvency, in which proceedings on the 20th of July the premises were set apart to him as a homestead. On August 11th he made a lease of the premises to Pfeiffer for five years, and on the same day assigned the lease to Ludeman, and on August 31, 1888, conveyed the premises to Ludeman. In view of all the evidence in the case, the court was authorized to find that these conveyances were made for the purpose of enabling Buss to defraud the plaintiff; and the finding that Pfeiffer and Ludeman took their conveyances with knowledge of the rights of the plaintiff, and that the conveyance to Ludeman was without any consideration, rendered the title of the plaintiff superior to their claim. There is no evidence in the record that there was any consideration for these conveyances, and the allegation in the complaint that the defend-

ants have received the rents therefor is not denied, the denial being merely of the amount received during a portion of the time. The judgment is limited to the amount which was proved to have been received.

Portions of the sixth and other findings are criticised. They are inartificially drawn, and the portions objected to are findings of probative facts which do not overcome or affect the findings of ultimate facts upon which the judgment is correctly based—as, for example, whether confidential relations existed between the parties, whether plaintiff was in possession, whether certain things were done with intent to defraud and deceive, and whether Buss continued the business as before until he went into insolvency. These are probative facts, tending to establish ultimate facts, but do not control the findings upon such ultimate facts.

It is further contended by appellant Ludeman that he should have been allowed a further credit against the rents collected by him from the property in question, amounting to \$819.50. The parties stipulated as to the amount of the rents with which he should be charged, and the credits which should be allowed him, except as to said sum, which was claimed to have been interest paid by him on money which he borrowed for the benefit and use of Buss in 1883. The amount so borrowed was \$3,600, to enable Buss to build upon the lot in question, which Buss then held under a lease for five years, and which he assigned to Ludeman as security. About a year later Buss purchased the lot, and, at the time he was adjudged an insolvent, had reduced Ludeman's claim to \$2,869.95; and this sum was presented by Ludeman as an unsecured claim against said insolvent, which was due to him upon the loan which he had made from the Franklin Savings and Building Association. Said sum of \$819.50 was made up of monthly installments of interest paid by Ludeman to the bank after the insolvency of Buss had been adjudged. It was a portion of Buss' indebtedness to Ludeman under the transaction had in 1883, for which Ludeman had taken the lease from Bertz as security. But it does not appear to have had any other relation to the premises in question, and there is nothing in the record showing that it was a claim against this property. The affidavit of Ludeman, when he presented his claim therefor against the estate of Buss in insolvency, that he held no security for its

payment, authorized the court to disallow it as a credit as the amount of rents received. The judgment and order appealed from are affirmed.

PETITION FOR REHEARING.

October 29, 1896.

PER CURIAM.—The opinion is modified by striking out the last sentence in division 2 thereof, and inserting in lieu thereof the following, namely: "The last amended complaint was filed February 20, 1893, and would authorize a recovery for all the rents received by the defendants within five years prior to that date: Code Civ. Proc., sec. 336, subd. 2. As the court was authorized to apply the amounts paid by the defendants for repairs, taxes, etc., in liquidation of the earliest items of rents collected by them, it is clear that the amount for which the judgment was rendered was not barred by the statute of limitations." Rehearing denied.

VENTURA & OJAI VALLEY RY. CO. v. COLLINS.*

L. A. No. 232; October 3, 1896.

46 Pac. 287.

Stock Subscription.—A Complaint on a Stock Subscription is not inconsistent because alleging that defendant, by his subscription, agreed to pay a certain amount "when and as it might be demanded," while this promise is not expressed, but merely implied, in the subscription set out as an exhibit.

Stock Subscription—Construction.—In a Stock Subscription, by which the subscribers agreed "to take the number of shares set opposite our names respectively, and thereon to pay the amount in cash named, to wit, ten per cent of the amount of stock by us subscribed, to B., treasurer of said corporation," opposite the name of each subscriber, under the words "Stock Subscribed," was written "\$2,000," and under the words "Amount of Cash" was written "\$200 pd." Held, that the obligation on the subscription was not limited to the \$200, but this amount was to be paid contemporaneously with the subscription, and the balance on call.¹

*See opinion in bank following this.

¹ Cited in the note in 93 Am. St. Rep. 359, on the liability to corporations of subscribers to their capital stock.

APPEAL from Superior Court, Ventura County; B. T. Williams, Judge.

Action by the Ventura and Ojai Valley Railway Company against J. S. Collins. Judgment for plaintiff. Defendant appeals. Affirmed.

Blackstock & Ewing for appellant; Barnes & Selby for respondent.

VANCLIEF, C.—The plaintiff is a corporation organized in accordance with the laws of this state for the purpose of constructing and operating a railroad in this state. Its capital stock, as fixed by its articles of incorporation, is \$250,000, divided into two thousand five hundred shares of \$100 each, of which shares only two hundred and sixty had been subscribed prior to the commencement of this action, and two hundred of which were subscribed prior to the incorporation. Subsequent to the incorporation, in June, 1892, the defendant subscribed for twenty shares at the price of \$2,000, and at the same time paid to plaintiff ten per cent of the par value thereof, and on June 15, 1893, paid a call of the corporation for an additional ten per cent of the subscription, and on July 13, 1893, paid another call for ten per cent, said payments aggregating \$600. On June 6, 1895, the corporation made another call on all the subscribers for forty per cent of their subscriptions, the defendant's proportion of which was \$800. The defendant refused to pay this last call, and thereupon this action was commenced to enforce payment thereof. The defendant's demurrer to the complaint having been overruled, and he having declined to answer the complaint, judgment was rendered against him for said sum of \$800, with interest and costs. Defendant brings this appeal from the judgment, upon the judgment-roll, and asks a reversal of the judgment on the alleged ground that the court erred in overruling his demurrer.

The alleged grounds of the demurrer are that the complaint is ambiguous and uncertain and that it does not state a cause of action. In addition to the facts above stated the complaint contains the following allegations: "(4) That prior to the incorporation of the plaintiff corporation there was actually subscribed to its capital stock for each mile of the contem-

plated work proposed by said corporation \$1,000 per mile, to wit, two hundred shares of stock of the corporation of the par value of \$100 each, aggregating \$20,000, and thereon there was paid for the benefit of the corporation, to a treasurer elected by the subscribers, ten per cent of the amount subscribed, the agreement for which is more fully set forth in a copy of the original agreement attached to this complaint, and marked 'Exhibit A,' reference being thereto had. (5) That thereafter, and subsequent to the incorporation of the plaintiff, to wit, on or about the first day of June, 1892, defendant herein subscribed and agreed to take twenty shares of the capital stock of said plaintiff corporation, and then and there agreed to pay for the same the sum of \$2,000, when and as it might be demanded by said plaintiff, a copy of his (defendant's) subscription to the capital stock of plaintiff corporation being hereto annexed, and marked 'Exhibit A'; and that said defendant, pursuant to said subscription, thereupon and thereafter became and was, and ever since then has been and now is, a stockholder of plaintiff corporation, holding and owning twenty shares of the capital stock of plaintiff corporation of the par value of \$100 each; that said defendant has not paid the said sum of \$2,000, or any part thereof, except as hereinbelow stated, though often requested so to do by the plaintiff." "(8) That in the management of its business operations and in the construction of its railroad this corporation expended about \$16,000, and therein and for its said purposes purchased material, and agreed to pay for the same, and borrowed money, and that the aggregate of its said obligations was about \$10,500 over and above the aggregate of amounts received by it from its stockholders. That to provide the funds to pay the indebtedness of said corporation so created in and about its business and in and about the construction of its railroad as hereinbefore stated, plaintiff corporation herein demanded from each and all of the subscribers to its capital stock and stockholders an additional payment of forty per cent of the amount of their several subscriptions respectively. (9) That on or about the sixth day of June, 1895, plaintiff herein demanded from defendant the payment of the sum of \$800, being said forty per cent of the amount of the capital stock for which defendant had subscribed, as hereinbefore stated, and had agreed to pay, and forty per cent of the par value of the stock of the plaintiff

corporation then held and owned by defendant. (10) That said defendant refused to pay said sum of \$800, so demanded by plaintiff herein, or any part thereof, and still refuses to pay the same, or any part thereof, though often requested so to do by plaintiff herein."

The following is a copy of Exhibit A, referred to in the above:

"EXHIBIT A. AGREEMENT.

"Whereas, for the development of the material interest of the town of San Buenaventura and the territory embraced within the Ranchos Santa Ana and Ojai, it is deemed necessary to have railway communication in and between said town and territory, and in the nature of a street railway; and whereas, a local corporation can best attain such object: Now, therefore, we, the undersigned, hereby agree to and with each other that we will together form a corporation to be known as the Ventura Railway Company, having all the corporate powers that may be deemed necessary or appropriate in the premises. We further agree that we will subscribe to the capital stock of said corporation in and at its organization the sum severally set by us opposite our respective names, and thereon pay in cash ten per cent in accordance with the law regulating the formation of railway corporations, and upon the subscription hereto of not less than \$20,000; that such corporation shall be formed by the subscribers hereto for the purposes suggested herein.

Subscribers.	Stock Subscribed.	Amount of Cash.
W. S. Chaffee.....	\$2,000	\$200 Pd.
Richard Robinson.....	2,000	200 Pd.
Joseph Hobart.....	1,000	100 Pd.
E. P. Foster.....	2,000	200 Pd.
K. P. Grant.....	2,000	200 Pd.
E. S. Hall.....	2,000	200 Pd.
J. K. Gries.....	2,000	200 Pd.
G. W. Chrisman.....	2,000	200 Pd.
W. H. Wilde.....	2,000	200 Pd.
A. D. Barnard.....	2,000	200 Pd.
A. Bernheim.....	1,000	100 Pd.

"Whereas, under and pursuant to the foregoing agreement and subscription, there was incorporated the Ventura & Ojai Valley Railway Company, to the capital stock of which there

was subscribed the amounts above named by the parties named respectively: Now, therefore, we, the undersigned, subscribe and agree to take the number of shares set opposite our names, respectively, and thereon pay the amount in cash named, to wit, ten per cent of the amount of stock by us subscribed, to A. Bernheim, treasurer of said corporation:

Subscribers.	Stock Subscribed.	Amount of Cash.
J. S. Collins.....	\$2,000	\$200 Pd.
F. Hartman.....	2,000	200 Pd.
J. R. Thorpe.....	2,000	200 Pd."

1. Counsel for appellant contend that the averment in the fifth paragraph of the complaint, that the defendant, by his subscription, agreed to pay the sum of \$2,000 "when and as it might be demanded," is inconsistent with the subscription itself, as exhibited and made a part of the complaint, because, they say, there is no express promise of Collins, Hartman and Thorpe, who subscribed after the incorporation, to pay more than ten per cent of the \$2,000 subscribed by each of them. The pleader evidently attempted to state the subscription contract according to its legal effect; and, if he did so, the alleged inconsistency does not exist. The only question, therefore, to be considered is one of construction of the subscription agreement. Read in the light of the circumstances alleged in the complaint, I think the subscription agreement implies a promise to pay the full sum subscribed upon such demands or calls as should be made therefor by the corporation; and surely whatever is implied in an agreement, though not expressed, may consistently and properly be alleged in a complaint upon such agreement. A subscriber for stock is one who has entered into an express contract to take a certain definite number of shares of the original issue of stock: Cook, Stock, Stockh. & Corp. Law, sec. 10, and notes. "The contract of subscription for shares of stock in an incorporated company may be entered into in various ways. Whenever an intent to become a subscriber is manifested, the courts incline, without particular reference to formality, to hold that the contract of subscription subsists. . . . Formal rules are, for the most part, disregarded": Id., sec. 52, and notes. "A subscription for shares implies a promise to pay for them, and this promise sustains an action to collect, without proof of any particular consideration. This rule

of law is sustained by the great weight of authority. The signing of the subscription paper is an implied promise to pay the subscription": *Id.*, sec. 71. "As a general rule, a call must be made in order to render a subscription, or any part thereof, due and payable to the corporation. A contract of subscription, unlike other contracts to pay money, is a promise to pay; but, by implication of law, the payment is to be only at such times and in such part payments as may be designated by the corporate authorities in a formal declaration known as a 'call.' In other words, the subscription is a debt payable at a future time. The time when it shall be paid is indefinite until fixed by a call": *Id.*, sec. 105, and notes. The subscription under consideration is an agreement "to take the number of shares set opposite our names, respectively, and thereon to pay the amount in cash named, to wit, ten per cent of the amount of stock by us subscribed, to A. Bernheim, treasurer of said corporation." The amount in cash named is \$2,000, set opposite the name of the defendant. It seems manifest that it was not intended by the phrase under the *videlicet* to limit the \$2,000 obligation to ten per cent of that sum. The ten per cent mentioned was evidently intended to designate merely that portion of \$2,000 which was to be paid contemporaneously with the subscription. Indeed, this construction was practically given it by the acts of the defendant in voluntarily paying two additional calls of ten per cent each, long after the subscription, and is the only construction which gives effect to all the language of the contract. The construction contended for by counsel for appellant would make the clause under the *videlicet* repugnant to that which precedes it, which is not allowable in construing a contract if it can be avoided consistently with the apparent object of the contract and the intent of the parties, which object and intent are to be ascertained by a view of all parts of the contract in connection with the circumstances under which it was made, and the subsequent acts of the parties tending to show how they understood it. Even in pleading, where the office and effect of the *videlicet* has been somewhat diverse, it was never allowed an effect repugnant to that which it purported to explain or define: *Am. & Eng. Ency. of Law*, and authorities cited. That which the *videlicet* clause is said to qualify and define in this case is perfectly explicit, and could not have been made more so by

definition or explanation. Even on the face of the instrument, and exclusive of the circumstances and subsequent acts of the parties, it is apparent that the parties did not intend to say that the agreement to pay \$2,000 meant the payment of only ten per cent of that sum, but only that ten per cent was to be paid at the time of the subscription; and this intent is satisfactorily verified by the subsequent acts of the parties in accordance therewith.

2. It is claimed by appellant that the complaint is ambiguous and uncertain as to whether the action is founded upon the subscription agreement or upon the statutory liability of a stockholder to the creditors of the corporation. But I perceive no ambiguity nor uncertainty in this respect. The action is brought by the corporation, and not by a creditor thereof, and unequivocally counts upon defendant's subscription to the capital stock of the corporation.

3. It is claimed that the complaint does not state a cause of action for the same reasons that it is said to be ambiguous and uncertain, and no other reason is specified by counsel. These reasons having been disposed of, no further consideration of this ground of demurrer is necessary. I think the judgment should be affirmed.

We concur: Searls, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

March 11, 1897.

PER CURIAM.—Upon the authority of *Ventura etc. Ry. Co. v. Hartman*, 116 Cal. 260, 48 Pac. 65, this day decided, the judgment entered herein is reversed, and the superior court is directed to sustain the demurrer to the complaint.

HAYFORD v. WALLACE.

Sac. No. 84; October 6, 1896.

46 Pac. 293.

Fraudulent Conveyances.—Land Conveyed to a Father in Trust for his minor son, who pays the consideration with money earned by himself, or given to him by the father, who is then solvent, is not subject to the lien of subsequent judgment against the father, so as to render his voluntary conveyance of the land, after becoming insolvent, fraudulent as to his creditors.

Trust—Suit to Quiet Title.—Land Which had Been Conveyed in trust for the sole use of the minor son of one of the trustees was, after the minor reached his majority, conveyed by the joint deed of the father and son to the mother, in consideration of love and affection, the second trustee not joining in the conveyance. Held, that, as the purpose of the trust had ceased on the son's becoming of age, his equitable title passed to the grantee, so far as to enable her to maintain suit to quiet title against all persons except the holders of the legal title.

Quieting Title—Evidence.—In an Action to Quiet Title, where defendant set up that the deed of plaintiff was made to defraud the grantor's creditors, among whom was defendant, an offer by defendant to prove, by the grantor, on cross-examination, that while the latter was insolvent he sold certain other land to another person for a nominal consideration, with a view of defrauding his creditors, was properly refused as not legitimate cross-examination.

Evidence.—Error in Rejecting Evidence is Cured by its subsequent admission.

APPEAL from Superior Court, Placer County; Matt. F. Johnson, Judge.

Action by Abbie A. Hayford against Emeline Wallace to quiet title. Defendant answered, setting up that the conveyances to plaintiff were fraudulent, and filed a cross-complaint to quiet title to the same lands. A decree was rendered quieting plaintiff's title to one part of the land, and quieting defendant's title to another portion, and both parties appealed from orders denying their motions for new trials. On defendant's appeal. Affirmed.

Wallace & Wallace and Henley & Costello for appellant; John M. Fulweiler and Ben. P. Tabor for respondent.

SEARLS, C.—This is an action by Abbie A. Hayford to quiet her title to certain parcels of land situate in Placer county. Defendant, by her answer, denied the title of plaintiff, and in apt terms averred that the land was the property of W. B. Hayford, the husband of plaintiff, who in December, 1886, was insolvent, and in contemplation of insolvency, and for the purpose of defrauding his creditors, without consideration other than love and affection, on the seventh day of December, 1886, executed a deed of conveyance of certain of the lands to his wife, the plaintiff, and that afterward, and on the eighth day of November, 1889, under like circumstances, with a like intent and upon a like consideration, he, the said W. B. Hayford, executed another deed of conveyance to the plaintiff of the remainder of the land and premises in the complaint described. Plaintiff is averred to have had full notice of the facts. Defendant was, as is alleged, at the date of said deeds a creditor of said W. B. Hayford to the extent of more than \$2,500. Other facts tending to show the conveyances fraudulent are alleged, but need not be noticed here. Defendant also interposed a cross-complaint, in which she showed that subsequent to such conveyances she procured judgment against W. B. Hayford upon a portion of the indebtedness due her from him, and issued execution, under which a levy was made upon such lands, a sale had, and the lands purchased by her, and that in due time she received a sheriff's deed for all of said lands, and thereby became the owner thereof, and prays that her title thereto may be quieted. Plaintiff answered the cross-complaint, and denied all fraud, etc. The cause was tried by the court, written findings filed, and a decree was entered thereon quieting the title of plaintiff to the parcel of land described in the deed of November 8, 1889, and quieting the title of defendant to the parcels of land described in the conveyance of December 7, 1886. Each of the parties moved the court for a new trial as to so much of the issues as were adverse to her, and, their several motions having been denied, each of the parties has appealed from the orders. This case (No. 84) is on defendant's appeal.

So far as this appeal is concerned, we may dismiss consideration of the deed of 1886, as the findings relating thereto are in favor of appellant, and she is not assailing them. Turning to the deed of November 8, 1889, we find the findings and conclusions of law are assailed by appellant upon various

grounds, the more important of which are: (1) The deed of November 8, 1889, is either void or voidable for the reasons: (a) That the testimony showed that W. B. Hayford was insolvent at the date thereof; and while the court found that he was insolvent in December, 1886, it failed to find upon the issue of such insolvency in 1889, when the deed of the last-mentioned date was executed. (b) That the testimony and findings show that W. B. Hayford and E. W. Moore held the property in trust for W. M. Hayford, the son of W. B. Hayford, and that, as said Moore did not join in the deed to plaintiff, it is void under sections 860 and 870 of our Civil Code. (c) The consideration of the deed is love and affection.

If the father, W. B. Hayford, held as a trustee, the deed is void for want of proper execution by the proper parties. On the other hand, if the father had a beneficial interest in the property, it is void because the father was in debt, and could not make a voluntary conveyance.

The following statement of facts, as found by the court, or illustrated by the evidence, is essential to a correct understanding of the points made by appellant: On the seventeenth day of May, 1882, one J. R. Johns, being the owner thereof, by grant, bargain and sale deed, conveyed to one E. W. Moore and to W. B. Hayford, in trust for W. M. Hayford (his son, then of the age, say, seventeen years), the tract of land in question, consisting of eighty acres of land. The consideration of the deed was \$400, of which sum the infant son paid one-half, viz., \$200 of his own money, which the evidence shows he earned by selling fruit, etc., at the railroad depot, Colfax, and which he had deposited in bank at Sacramento. E. W. Moore paid his half of the purchase money. W. M. Hayford, the infant, entered into possession of the land so purchased, and paid his share of the expense of improving and cultivating the same, amounting to a large sum of money. It is quite apparent, we think, from the testimony, that the parties did not understand that any trust relation existed, except as to the undivided half of W. M. Hayford, the minor. The conveyance, however, is worded in part as follows: "This indenture, made the seventeenth day of May, 1882, between J. R. Johns, of Amador county, state of California, party of the first part, and Elisha W. Moore, of Beaver county, state of Pennsylvania, and W. B. Hayford, in trust for W. M. Hayford, a minor, parties of the second part, for and in con-

sideration of the sum of \$400, . . . doth grant, bargain, sell and convey unto the parties of the second part and their heirs and assigns forever," etc. There is in the deed no other indication of a trust, save in the foregoing quotation. On the eighth day of November, 1889, the minor, W. M. Hayford, who was at the last-mentioned date twenty-four years of age, united with his father, W. B. Hayford, the latter of whom is described as "trustee," in a conveyance of the undivided one-half of the said eighty acres of land to the plaintiff herein. Love and affection are mentioned as the consideration of the conveyance, which is in the usual form of a grant, bargain and sale deed. There is not in the pleadings any allegation, nor was there any evidence tending to show, that W. B. Hayford was insolvent prior to 1886. The appellant here was not a creditor of Hayford until 1885. When, on the seventeenth day of May, 1882, Johns conveyed the property in question to Moore and W. B. Hayford in trust for W. M. Hayford, a minor, the effect of that conveyance was (conceding that the whole estate, and not one-half thereof, was intended to be held by the grantees for the benefit of the minor, as claimed by appellant) to vest the title in Moore and W. B. Hayford, for the sole benefit of the minor. Appellant contends that as the minor lived at the time with his parents, and as there was no evidence that W. B. Hayford had relinquished his right to the earnings of his son, the \$200 paid by the latter is to be regarded as the money of the father. We think, when the father permitted his son to engage in the business of selling fruit, receiving and banking the proceeds in his own name, and, without objection, permitted him to pay it out as the consideration for land purchased for his benefit, it was sufficient evidence that the father had assented to the ownership of the money by the son, as found by the court. The question is of no practical importance, however, in the determination of the case, for the reason that W. B. Hayford, being, so far as appears, entirely solvent at that date (1882), might with the utmost propriety give to his minor son the modest sum of \$200 to enable the latter to purchase land with which to engage in the fruit and vineyard business. In either aspect of the case, then, the minor son had, as against his father, the entire beneficial interest in the land, with only the naked title in the father, or in the father and Moore. W. B. Hayford never had any interest in the land to which the lien

of appellant's later judgment could attach, or which in 1886, when he became insolvent, or at any time thereafter, he could convey in fraud of his creditors, or of anyone except his cestui que trust. A bankrupt may continue to discharge his duty as a trustee, and trust property in his possession does not go to his assignee or to his creditors: Perry, Trusts and Trustees, secs. 345-358. Under these circumstances, the insolvency of said Hayford in 1889, when he united with his son in a conveyance to the respondent here, becomes a false quantity in the problem, and it was not necessary to find thereon.

The deed of November 8, 1889, is a joint one by W. B. Hayford, trustee, and W. M. Hayford, as parties of the first part, and, in consideration of love and affection, conveys the undivided one-half of the eighty acres of land theretofore, and since 1882, held in trust for W. M. Hayford, to Abbie A. Hayford, her heirs and assigns. W. M. Hayford, as before stated, had reached his majority. The entire object of the trust, viz., to hold the legal title during the minority of said W. M. Hayford, had been accomplished. "When the purpose for which an express trust was created ceases, the estate of the trustee also ceases": Civ. Code, sec. 871. It is true, the naked legal title was vested in W. B. Hayford, or in him and Moore. It is equally true that, as a rule, two or more trustees must join in a conveyance of the legal title. But W. M. Hayford, having at the date of his conveyance a perfect equitable title, could convey the same; and, having done so, his grantee, the respondent here, became and is vested with such equitable title, and by virtue thereof is in a position to command a conveyance of the legal title, if desired. As such holder of the equitable title, respondent is in a position to maintain an action to quiet her title against the defendant and all persons except the holders of the legal title: Orr v. Stewart, 67 Cal. 275, 7 Pac. 693; Smith v. Brannan, 13 Cal. 107; Wilson v. Madison, 55 Cal. 5.

The alleged error of the court in refusing to permit defendant to prove by W. B. Hayford, on cross-examination, that while he was insolvent, to wit, on December 3, 1886, with a view of defrauding, hindering and delaying his creditors, etc., he sold to Jacob N. Neff nine hundred and seventy-two acres of land for the nominal consideration of \$500, cannot be maintained for the reasons: (1) It was not legitimate

cross-examination. (2) For the reason that as he did not own any interest in the tract of land here in dispute at that time, and had not for years prior to the time he is averred to have become insolvent, it was wholly irrelevant and immaterial. (3) And for the further reason that the court at a later period in the trial permitted this very proof. We recommend that the order appealed from be affirmed.

We concur: Vancief, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order appealed from is affirmed.

ASCHA et al. v. FITCH.

Sac. No. 115; October 6, 1896.

46 Pac. 298.

Mining Lien Claim—Sufficiency—Statement.—Under Code of Civil Procedure, section 1187, which requires the claimant of a lien for labor performed on a mining claim to file for record his claim, containing a statement, among other things, of "the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed," a lien claim which fails to state by whom the claimant was employed is fatally defective.

Mining Claim Lien—Sufficiency of Statement.—A claim for lien, after describing the mining claim, stated that F. was the owner of the claim, "the said lien being held and claimed for and on account of work and labor performed by me as a miner for said F. on said mining claim" for a period definitely stated, "under an agreement with said F.," etc. Held, that such claim stated by whom the claimant was employed, as required by Code of Civil Procedure, section 1187.

Mining Claim Lien.—Such Claim of Lien Contained a Sufficient statement of the "terms, time given, and conditions of the contract," as required by statute.¹

¹ Cited and followed in *Castagnetto v. Coppertown Min. etc. Co.*, 146 Cal. 333, 80 Pac. 76, where, as to compliance with the lien law in respect of the statement, the court say the statute is not to be so narrowly construed as to fritter away and destroy the claimant's rights.

Mining Claim Lien.—Where the Precise Words of the Statute have not been used by the claimant of a lien for labor done on a mining claim, but substantially equivalent expressions have been resorted to, it is a sufficient compliance with the statute.

Mining Claim Lien.—In an Action to Enforce a Lien for Labor Done on a mining claim, where it appears that the claim for lien is insufficient because it fails to state by whom the claimant was employed, the claimant is entitled to a personal judgment against defendant for the amount due him, and it is error to grant a motion for nonsuit.

APPEAL from Superior Court, Siskiyou County; J. S. Beard, Judge.

Action by Nathan Ascha and others against C. S. Fitch to enforce three several liens, one in favor of each of the plaintiffs, on the Gold Nugget mining claim. From a judgment of nonsuit plaintiffs appeal. Reversed.

Warren & Taylor for appellants; Herbert R. Raynes and L. F. Coburn for respondent.

SEARLS, C.—This action is brought to enforce three several liens, one in favor of each of the plaintiffs, for labor performed upon the Gold Nugget mining claim, situate in the county of Siskiyou. The three plaintiffs united in the action, as under section 1195 of the Code of Civil Procedure they may properly do. At the trial the liens were severally offered in evidence. To their introduction, and to the introduction of each of them, counsel for defendant objected, "upon the grounds that it is incompetent, irrelevant, immaterial, and, further, that it does not comply with section 1187 of the Code of Civil Procedure, which section provides what these claims of lien shall contain. It is not verified, as provided by law it shall be. It does not contain the name of the person by whom this man was employed. It does not contain a statement of the terms, time given, or conditions of the contract." The court sustained the objection, to which ruling counsel for plaintiffs duly excepted. Thereupon counsel for plaintiffs rested, and on motion of defendant's counsel a nonsuit was granted. These several rulings were relied upon by the plaintiffs in a motion for a new trial, and from an order denying such motion they appeal.

There was proof of the performance by plaintiffs of the labor for defendant upon the mining claims, and of the filing of the liens in due time, and the first question involved relates to the sufficiency of the several liens and of the affidavits thereto. We are of opinion that the ruling of the court in excluding the lien of George F. Ascha, one of the plaintiffs, was correct. Under section 1187 of the Code of Civil Procedure, the lien claimant is required to file for record his claim, containing a statement, among other things, of "the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed," etc. The lien filed by said George F. Ascha states that C. S. Fitch is the owner and reputed owner, but fails to state by whom he was employed. This was a fatal omission: *Wood v. Wrede*, 46 Cal. 637. Different considerations apply to the other two liens. They are substantially alike, and we set out one in full, with the affidavit attached thereto, as a type of the other. It is as follows:

"Know all men by these presents, that I, L. F. McCoy of Sawyer's Bar, Siskiyou county, state of California, do hereby give notice of my intention to hold and claim a lien, by virtue of the statute in such case made and provided, upon that certain real estate in said Siskiyou county, in Liberty mining district, and known as the 'Gold Nugget Mining Claim'; that C. S. Fitch is the owner and reputed owner of said mining claim, the said lien being held and claimed for and on account of work and labor performed by me as a miner for said C. S. Fitch upon said mining claim for the period of thirty-six days from the 10th day of April, 1894, up to and including the 30th day of May, 1894, under an agreement with said C. S. Fitch, for an agreed per diem of \$2.50, amounting in the aggregate to the sum of \$90; that by the terms of said agreement I was to receive my pay at the end of each and every week; that I have received for said work and labor the sum of \$16, and no more, leaving a balance still due, owing, and unpaid to me of the sum of \$74; that thirty days have not elapsed since the performance of said work and labor.

"L. F. McCOY.

"State of California,
"County of Siskiyou,—ss.

"On this 23d day of June, 1894, personally appeared L. F. McCoy, who, being by me first duly sworn, on his oath says that the abstract of indebtedness mentioned and described in the foregoing notice is true and correct, and that there is still due and owing to him from the said C. S. Fitch, for the work and labor aforesaid, the sum of \$74, after deducting all just credits and offsets.

"L. F. MCCOY.

"Subscribed and sworn to before me this 23d day of June, 1894.

"[Seal]

JOHN S. HUGHES,

"Notary Public for Siskiyou County, Cal."

From the foregoing notice it will be observed that the claimant states, among other things: (1) That the owner and reputed owner of the mining claim is C. S. Fitch. (2) That the lien is claimed on account of labor performed by claimant upon the mining claim for said C. S. Fitch. (3) That it was performed under an agreement with said C. S. Fitch, for an agreed price of \$2.50 per day, payable at the end of each week. (4) That he has received for such work a given sum, and no more, leaving a balance of \$74 due and owing. (5) The affidavit states that said sum of \$74 is still due and owing him, after deducting all just credits and offsets.

To say that A performed labor for B does not necessarily imply that B employed him; but to assert that A performed labor for B under an agreement with the latter as to the rate of wages and time of payment is to allege substantially that A was employed by B. The notice of lien contained a sufficient statement of the "terms, time given, and conditions of the contract." It is true that a mechanic's lien is purely a statutory creation, and that he who would avail himself of its benefits must show a substantial compliance with the terms of the statute. It by no means follows, however, that courts should give to the statute a construction tending, by its technicality, to fritter away, impair or destroy the benign objects aimed at in its adoption. Whatever is made necessary to the existence of the lien must be performed, or the attempt to create it will be futile. But we are not called upon to hold the claimant to a rigid technicality as to the

manner of performance; and where it appears that the precise words of the statute have not been used by the claimant, but that other and substantially equivalent expressions have been resorted to, it will be deemed a sufficient compliance with the requirements of the law. In this view of the case, the liens of L. F. McCoy and Nathan Ascha were sufficiently explicit to entitle them to be admitted in evidence, and their exclusion was erroneous.

2. The order granting defendant's motion for a nonsuit was erroneous. The lien of C. F. Ascha, as before stated, was without validity, but, upon the evidence disclosed by the record, he was entitled to a personal judgment against the defendant for the amount due him: *Morris v. Wilson*, 97 Cal. 644, 32 Pac. 801; *Lacore v. Leonard*, 45 Cal. 394; Code Civ. Proc., sec. 580. We recommend that the order denying a motion for a new trial be reversed and a new trial ordered.

We concur: Vanelief, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order denying a motion for a new trial is reversed and a new trial ordered.

KELLEY v. SERSANOUS, County Treasurer.

Sac. No. 166; October 6, 1896.

46 Pac. 299.

County Treasurer—Action to Compel Payment of Warrant—Evidence.—In an action to compel a county treasurer to pay a warrant, plaintiff alleged that under a contract with the county he had collected certain money due it, for which his compensation was to be fifty per cent; that he presented his claim to the supervisors, who allowed it; that the auditor drew a warrant, and that the treasurer refused to pay it. The answer denied any agreement with plaintiff except a certain written contract, substantially as alleged by plaintiff. The answer averred that such contract was ultra vires and void, denied that plaintiff rendered any services under the contract, and alleged that the county from which the money was collected had instituted an action to recover it back, and that the same was still pending. The contract with plaintiff did not, on its face, appear to

be ultra vires or void. Held, that the pleadings made a prima facie case in favor of plaintiff, and the burden of proof was on defendant to show facts, if any existed, to defeat the case thus made.¹

APPEAL from Superior Court, Glenn County; Frank Moody, Judge.

Petition by K. E. Kelley for a writ of mandate to compel J. F. Sersanous, treasurer of Glenn county, to pay a warrant drawn on said treasurer by the county auditor, and payable to petitioner. From a judgment in favor of defendant, petitioner appeals. Reversed.

John T. Harrington for appellant; George D. Dudley for respondent.

SEARLS, C.—Writ of mandate to compel the defendant, as treasurer of the county of Glenn, to pay a warrant for \$811.36, drawn upon the said treasurer by the county auditor, and payable to petitioner. Defendant had judgment in the court below, from which judgment plaintiff appeals.

At the trial the plaintiff or relator read to the court his petition and the answer thereto, and rested his case. Thereupon defendant declined to introduce any evidence, and the cause was submitted to the court, and thereafter it filed written findings, specifying that the "contract alleged and set out in the answer of the defendant, and alleged as the contract upon which the claim of the plaintiff and relator is based, is ultra vires and void." The question involved in the case is this: Under the pleadings, upon whom did the burden of proof rest? Had the plaintiff moved the court for judgment upon the pleadings, he would, in effect, have admitted that all of the averments of the answer were true: Ward v. Flood, 48 Cal. 36, 17 Am. Rep. 405; Fleming v. Wells, 65 Cal. 339, 4 Pac. 197; People v. Johnson, 95 Cal. 474, 31 Pac. 611; McGowan v. Ford, 107 Cal. 177, 40 Pac. 231. He did

¹ Cited with approval in Knight v. City of Eureka, 123 Cal. 194, 55 Pac. 769, the court holding, however, that it gave no warrant to a municipality to empower the attorney selected by it to select and employ another attorney to assist him.

Cited with approval in Merriam v. Barnum, 116 Cal. 623, 48 Pac. 728. In that case, though, the attorney had been employed to attend the board and advise it on a variety of matters at a monthly salary, and the claim was not sustained.

not, however, thus move the court, but contented himself with submitting his case upon the admissions of the pleadings, upon the theory that under such pleadings the burden of proof was cast upon the defendant. The following is a summary of so much of the pleadings as are important for the purpose in view. The petition for the writ of mandate shows, among other things: (1) Defendant is treasurer of Glenn county. (2) That on the fifteenth day of November, 1892, the board of supervisors of Glenn county, being advised that said Glenn county had divers claims and demands against the county of Colusa, entered into an agreement with petitioner whereby they employed him, as an attorney at law, to collect the same, by action at law or otherwise, for the use of Glenn county, and for his compensation he was to receive fifty per cent, or one-half, of all he should collect. (3) That he performed services under said agreement, whereby there was paid into the state treasury, for the credit of Glenn county, in November, 1894, on account of railroad taxes, under what is known as the "Reassessment Act," in cases where former assessments were void, etc., the sum of \$1,622.72. The fourth, fifth, sixth, seventh and eighth paragraphs of the petition, all of which are by the answer and findings of the court admitted and found to be true, are statements in apt words and proper form of the making and filing with the clerk of petitioner's claim for one-half of the sum collected, viz., for \$811.36, duly verified, etc.; the consideration thereof by the board of supervisors, and the allowance thereof by said board, and an order for its payment; the drawing of a warrant therefor by the auditor in his favor on the common fund; the presentation thereof to the county treasurer, and the indorsement thereon by the treasurer, "Not paid, for the want of funds"; that on June 13, 1895, there were in the treasury funds to pay said warrant, and demand of payment thereof, and refusal of the treasurer to make such payment. The answer denies that there was any agreement with petitioner except a certain written contract, which is set out in *haec verba*, and which, not being denied, as provided by section 448 of the Code of Civil Procedure, is to be taken as admitted. This contract, which is duly executed and approved by the district attorney, recites that the board of supervisors of Glenn county, by and with the advice and consent of the district attorney, agrees and contracts with K. E. Kelley that all debts, dues and de-

mands within the province and power of the board against the county of Colusa, growing out of the division of Colusa county and the formation of Glenn county, and due to said Glenn county, are turned over to Kelley for collection, and he is authorized to sue therefor in the name of Glenn county, and to take all necessary steps to recover the same. Kelley is to pay all costs and expenses, and to give a bond to hold Glenn county harmless therefrom. Suit to be brought on or before May 1, 1893, and to be diligently prosecuted, unless a satisfactory settlement is reached before the last-named date. Kelley to receive one-half of all sums collected (except school moneys); the other half to be turned over to Glenn county. The answer avers this contract "so entered into by the board of supervisors, was ultra vires and void." The answer sets up other defenses, among which are: (1) That it denies, on information and belief, that Kelley rendered any services under the contract, but that the sum of \$1,622.72 was apportioned to Glenn county by the state board of equalization on account of back taxes collected from a railroad company upon its road extending through said Glenn county. (2) That Colusa county claims this identical money from Glenn county, has instituted an action to recover the same, which is pending and undetermined, etc.

In *McGowan v. Ford*, 107 Cal. 177, 40 Pac. 231, it was held, in substance, that where it is averred in the petition, and not denied, that the board of supervisors allowed the claim, and ordered a warrant drawn therefor, and that a warrant was regularly drawn by the auditor, and delivered to the petitioner, it must be presumed that official duty in allowing and issuing the warrant was regularly performed, and the burden of proof is upon the treasurer to show that he was justified in refusing payment, and it does not rest upon the plaintiff to show, by affirmative proof, that the board of supervisors had jurisdiction to issue the warrant, merely because the averments of the answer show that the board of supervisors had no jurisdiction to allow the claim. *McFarland v. McCowen*, 98 Cal. 329, 33 Pac. 113, and *Colusa Co. v. De Jarnett*, 55 Cal. 375, are to like effect. This doctrine is subject to the exception that, if it appears on the face of the claim that it is one over which the board of supervisors had no jurisdiction, or that they acted in excess of their jurisdiction, the auditor may refuse to draw his warrant in pay-

ment of the claim, or, having done so, the treasurer may refuse payment: *Linden v. Case*, 46 Cal. 171; *Merriam v. Board*, 72 Cal. 518, 14 Pac. 137; *Carroll v. Siebenthaler*, 37 Cal. 193; *McFarland v. McCowen*, *supra*. There is no brief on file on behalf of defendant, and, if the contract set out in the answer is ultra vires the powers of the supervisors, we fail to see wherein. It is substantially such a contract as was upheld in *Lassen Co. v. Shinn*, 88 Cal. 510, 26 Pac. 365. We are of opinion that the due allowance of the claim by the board of supervisors for the services of petitioner as an attorney (the fact that he is an attorney at law is not denied), and the presentation to the treasurer of a warrant therefor in favor of petitioner, issued in due form by the auditor, when there were funds in the treasury applicable to the payment thereof, made a prima facie case in favor of the petitioner; and, these facts being admitted, the burden of proof was cast upon the treasurer to show facts, if any existed, to defeat the case thus made. It follows that the judgment should be reversed and a rehearing had.

We concur: Britt, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is reversed and a rehearing had.

HAYFORD v. WALLACE.

Sac. No. 79; October 6, 1896.

46 Pac. 301.

Gift of Life Insurance by Husband to Wife.—A voluntary promise on the part of a husband to assign a life insurance policy to his wife, without delivery of possession of the policy, does not constitute a gift to the wife, so as to serve as a valuable consideration for a note subsequently given by the husband to the wife for the proceeds of the policy, which were collected and used by him.

Fraudulent Conveyance.—On the Issue as to the Solvency of the Grantor at the time of a voluntary conveyance, there was evidence that he was a member of a firm whose books showed assets considerably in excess of liabilities, but that the firm shortly afterward assigned for the benefit of creditors, and that the assignee, after

seven years, had been unable to reimburse himself for money advanced to pay firm debts; that judgment was rendered against the grantor on an individual debt, which he compromised for fifty per cent; that he owed several thousand dollars in individual debts, and that he owned an interest in a land speculation, the value of which was placed by witnesses at between \$20,000 and \$30,000, but which proved worthless. Held, that a finding that the grantor was insolvent was warranted.

Appeal.—An Assignment of Error That the Findings do not support the judgment cannot be considered on appeal from an order denying a new trial; an appeal from the judgment is necessary.

APPEAL from Superior Court, Placer County; **Matt. F. Johnson**, Judge.

Action by **Abbie A. Hayford** against **Emeline Wallace**. There was a judgment for defendant and from an order denying a new trial plaintiff appeals. **Affirmed.**

Wallace & Wallace and **Henley & Costello** for appellant; **John M. Fulweiler** and **Ben. P. Tabor** for respondent.

SEARLS, C.—Action to quiet title to separate parcels of land conveyed to appellant by separate deeds. Defendant, as a defense and by way of cross-complaint, averred the tract of land involved in this appeal was conveyed to plaintiff, who is appellant, by **W. B. Hayford**, her husband, November 7, 1886, without other consideration than love and affection; that at said date said **W. B. Hayford** was insolvent, and that defendant was a creditor of said **Hayford**, and that she secured a judgment, under which the land was sold, and she claims title under a sheriff's deed, etc. Defendant also pleaded actual fraud on the part of **Hayford**, and knowledge thereof on the part of his wife. Defendant had a decree in her favor as to the land conveyed to plaintiff December 7, 1886. Plaintiff moved for a new trial, which was refused, and this appeal is from the order of refusal. The court found, among other things: (1) That **W. B. Hayford**, the husband of plaintiff, on the seventh day of December, 1886, conveyed the land in question to the plaintiff, who entered into possession. (2) That the only consideration for the conveyance was love and affection, and there was no valuable or money consideration therefor. (3) That at the time of such conveyance **W. B. Hayford** was insolvent, and unable to pay his debts, and

among his creditors at that time was the defendant, Emeline Wallace, to whom he was indebted in the sum of \$2,500 upon two promissory notes of \$1,250 each. (4) Hayford did not execute the deed to his wife in contemplation of insolvency, or to hinder, delay or defraud his creditors. (5) Plaintiff did not know, at the date of the execution of the deed, that her husband was insolvent, and did not accept the deed with knowledge of any fraudulent intent on the part of her husband.

The second of the foregoing findings is assailed upon the ground that the evidence is insufficient to justify the finding "that love and affection was the only consideration for the deed, and that no valuable nor money consideration was paid therefor." It is true, there was evidence tending to show that W. B. Hayford, who was a merchant at Colfax, and a member of the firm of Hayford, Perkins & Co., held a policy of insurance upon his life, payable, about 1883, to his then wife, or, in case of death, to said Hayford. His wife died, and he intermarried with the plaintiff and appellant in 1876. The plaintiff testified that the first year of their marriage her husband told her of the policy, and said when it was paid she should have the money, but that when it was paid he wanted to use the money, and promised to give her his note, with interest at ten per cent. This was in 1883, and on April 10, 1886, he gave her a note for \$2,000, which was the consideration for the deed in question. Hayford himself testified that he assigned the policy to his wife, and that she kept it until it was due, in 1883, when she delivered it to him for collection, and that he neglected to give her a note, as he had promised, until 1886. On the other hand, there was testimony tending to show that this insurance policy was pledged to Mr. Wallace, the husband of defendant, as security for a debt due him from said Hayford, and remained in his hands until his death, and until it was due, in 1883, when it was delivered to Hayford by order of the respondent, as representative of her deceased husband, and the money collected and paid over to her in satisfaction of the debt, or a portion of it, owing by said Hayford. This involved a contradiction of the statement that the policy was delivered by Hayford to his wife, and retained by her. The court evidently believed the statement of Mrs. Emeline Wallace. In this view the policy did not constitute a gift to the plaintiff for want of delivery of pos-

session, and did not serve as a valuable consideration for the note of April 10, 1886, made by Hayford to plaintiff. Again, according to all the statements, the policy of insurance was for \$1,800. Hayford paid in premiums, after the alleged gift to his wife, the sum of say \$900 from his own money, and then gave his wife a note for \$2,000 on account thereof. There are a variety of minor circumstances disclosed by the record tending in the same direction, and which serve to create such a conflict in the evidence as to preclude our interposition to set aside the finding upon the ground that it is not supported by the evidence.

2. Appellant also attacks the third finding, wherein it is found that W. B. Hayford was at the date of the execution of the deed to his wife (December 7, 1886) insolvent and unable to pay his debts, and that among his creditors was defendant, whom he owed \$2,500, etc. Upon this issue there was testimony tending to show that the firm of Hayford, Perkins & Co., in December, 1885, and December, 1886, owed some \$35,000 to \$40,000, and was possessed of assets in lands, buildings, book accounts, notes, etc., sufficient to meet all their liabilities and leave a balance of say \$25,000 to \$28,000; that Hayford owed several thousand dollars in individual debts, but had an interest in a colony known as "Chicago Park," which, in the opinion of witnesses, was worth, in 1886, from \$20,000 to \$30,000. This Chicago Park enterprise, it is easy to see, was a speculative business, with valuations fixed at "boom prices," and which was a disastrous failure, becoming worthless as an investment. There is no pretense that any considerable portion of the land was or could be sold in 1886 at any price. Hayford was sued for some \$2,200, and a judgment obtained against him for that amount, which he was able to and did compromise for \$1,100. He admitted that he was pushed by his creditors, and did not pay; and, notwithstanding the favorable showing as to assets, the stubborn fact remains that in the same month that Hayford conveyed the land in question to his wife, viz., December, 1886, the firm of Hayford, Perkins & Co. assigned all their property to one Egbert, for the benefit of their creditors; that said Egbert advanced \$17,000 of his own funds to pay firm debts, and up to the time of trial of this cause (November, 1893) had not been able to reimburse himself from the firm assets for the money thus advanced, while Hayford had gone through in-

solvency. In the face of this testimony it is futile to argue against the sufficiency of the testimony to uphold the finding of insolvency on the part of W. B. Hayford on December 7, 1886.

3. Appellants further contend that the findings do not support the judgment. This question is not involved in an appeal from an order denying a motion for a new trial. Errors in the conclusions of law, drawn from the facts as found and in the judgment entered thereon, are not errors of law occurring during the course of the trial, but subsequent thereto, and can only be taken advantage of by an appeal from the judgment: *Shepard v. McNeil*, 38 Cal. 74; *Martin v. Matfield*, 49 Cal. 42; *Jenkins v. Frink*, 30 Cal. 595, 89 Am. Dec. 134. An error of the trial court in rendering conclusions of law which are not supported by the findings is an error which should be reviewed by a direct appeal from the judgment, and is not a "decision against law," for which a new trial should be granted: *Shanklin v. Hall*, 100 Cal. 26, 34 Pac. 636; *In re Doyle*, 73 Cal. 565, 15 Pac. 125; *Mazkewitz v. Pimentel*, 83 Cal. 450, 23 Pac. 527; *Kirman v. Hunnewill*, 93 Cal. 526, 29 Pac. 124; *Brisson v. Brisson*, 90 Cal. 323, 27 Pac. 186. *Simmons v. Hamilton*, 56 Cal. 493, which seems to hold a contrary doctrine, was concurred in by but two judges, and has not been followed.

A number of exceptions were taken at the trial to the admission and exclusion of evidence. We have examined them with care, and find them either groundless or not of sufficient importance to warrant a reversal. To discuss them at length would occupy much space, and, as they contain no novel questions, would be productive of no good. We recommend that the order appealed from be affirmed.

We concur: Vancief, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order appealed from is affirmed.

In re SILVAR'S ESTATE.

S. F. No. 331; October 7, 1896.

46 Pac. 296.

Administrators—Appointment of Stranger—Revocation.—Code of Civil Procedure, section 1379, having authorized a court to appoint a stranger as administrator of an estate upon the written request of one who would himself be entitled to letters of administration, where such request and a renunciation have been filed by a petitioner, and proceedings for his appointment have been instituted, the heir will not be permitted to revoke it without reason.

Administrators—Withdrawal of Request for Appointment.—Where an Order refusing to permit an heir to withdraw a request for the appointment of another as administrator of an estate is based on conflicting testimony, it will not be reversed on appeal.

APPEAL from Superior Court, Santa Cruz County; J. H. Logan, Judge.

Application for the appointment of Joseph L. Enos as administrator of the estate of Silvar, deceased. From an order granting the petition, Antonio Silvar appeals. Affirmed.

Frank B. Josephs, Delmas & Shortridge, Edw. A. Holman and Edw. H. Shaw for appellant; Lindsay & Cassin for respondent.

PER CURIAM.—A petition for letters of administration upon the estate of the above-named decedent was filed in the superior court by Joseph L. Enos, who stated therein that he had been requested by Antonio Silvar, the brother of the deceased, to act as administrator of the estate, and accompanied his petition with the written renunciation by said Antonio of his right to letters of administration upon the estate, and a request to the court to appoint Enos as such administrator. Prior to the day set for hearing the petition, Antonio filed a revocation of his said renunciation, and a petition that he might himself be appointed administrator of the estate, and also filed an opposition to the appointment of Enos, upon the ground of his incompetency. The petitions were heard together, and the court granted that of Enos, and ordered letters of administration to be issued to him. From this order Antonio has appealed.

The court found "that the revocation of the waiver of said Antonio of his right to act as such administrator, and his request for the appointment of said Enos, as stated in the findings herein, was without reason in fact, but such revocation was solely on the ground that said Antonio had changed his mind in relation thereto"; and, as a conclusion of law, found "that said revocation by said Silvar was not authorized in law, and was for that reason void." The principal grounds urged upon the appeal are that the request of Antonio for the appointment of Enos was obtained by fraud, and was made upon the agreement by Enos that he would withdraw whenever Antonio should so wish, and that since making the request Enos had manifested such hostility to the rights of Antonio as to justify the withdrawal of his request. The evidence upon these several questions of fact was sharply conflicting at the trial, and we are therefore precluded from disturbing the conclusions of the court thereon. The statute (Code Civ. Proc., sec. 1379) authorizes the court to appoint a stranger as administrator, upon the written request of one who would himself be entitled to letters of administration; and in *Re Kirtlan's Estate*, 16 Cal. 161, it was held that after having made such request, and encouraged the petitioner to go to the expense and trouble of applying for the office, the heir would be estopped from withdrawing his renunciation: See, also, *In re Bedell's Estate*, 97 Cal. 339, 32 Pac. 323. The order is affirmed.

SANTA CRUZ BUTCHERS' UNION v. I X L LIME CO.

S. F. No. 416; October 10, 1896.

46 Pac. 382.

Agency—Proof of.—Declarations of One That He is Agent of another are not admissible to prove the agency, nor to bind the alleged principal, until proof of the agency has first been made.

APPEAL from Superior Court, Santa Cruz County; J. H. Logan, Judge.

Action by the Santa Cruz Butchers' Union against the I X L Lime Company. Judgment for plaintiff and defendant appeals. Reversed.

J. J. Burt for appellant; Spalsbury & Burke for respondent.

PER CURIAM.—The action was to recover for merchandise alleged to have been sold to defendant, the theory of plaintiff being that the goods were sold and delivered through one B. Cerf, acting as defendant's agent. Without first requiring proof of the agency, the court, against defendant's objection, admitted the testimony of several witnesses as to declarations by Cerf of his authority to represent the defendant, and that they supposed he was defendant's agent, because he was at the time acting as superintendent of the lime works, which defendant had theretofore been conducting. This evidence was wholly hearsay, and clearly inadmissible; and, as it was in great part all the evidence upon which the finding of Cerf's agency was based, its admission was manifestly prejudicial. It was necessary that plaintiff first establish the fact of agency before the declarations of such agent were admissible to bind defendant: *Grigsby v. Water Works Co.*, 40 Cal. 396; *Smith v. Insurance Co.*, 107 Cal. 432, 437, 40 Pac. 540. Neither the statement of M. Cerf that Baruch Cerf was the superintendent, nor the letter from Blochman & Cerf, were shown to emanate from anyone authorized to bind the defendant, and were not, therefore, conclusive of defendant's liability. Judgment and order reversed.

PEOPLE v. FUGITT.

Crim. No. 199; October 13, 1896.

46 Pac. 379.

Criminal Law—New Trial—Appeal.—Action of the Trial court in granting a new trial in a criminal case on the ground that the verdict was not supported by the evidence, which, though ample, was conflicting, will not be disturbed.

APPEAL from Superior Court, Kern County; A. R. Conklin, Judge.

Thomas F. Fugitt was convicted of grand larceny and from an order granting a new trial the people appeal. Affirmed.

W. F. Fitzgerald for the people; E. J. Emmons and F. M. Graham for respondent.

PER CURIAM.—Defendant was convicted of grand larceny in stealing a certain described steer. He moved for a new trial upon various grounds, and, among others, he claimed that the verdict of the jury was not supported by the evidence, and also that the court misdirected the jury as to matters of law. The motion for a new trial was granted, and this appeal is by the people from such order. The order of the court granting the new trial is a general order. While we are satisfied there was ample evidence to support the verdict, yet the evidence was directly and substantially conflicting upon the main issues involved, and, such being the fact, we will not disturb the action of the trial court in granting a new trial. For the foregoing reasons, the order appealed from is **affirmed**.

CANNON v. MCGREW et al.

S. F. No. 448; October 15, 1896.

46 Pac. 463.

Appeal—Sufficiency of Evidence.—A Finding of the trial court based on conflicting evidence will not be reviewed on appeal.

Appeal—Harmless Error.—Exceptions Based upon the Rulings of the trial court as to the admission of testimony will not be considered on appeal, in the absence of anything to show that the appellant was prejudiced thereby.

APPEAL from Superior Court, Sonoma County; S. K. Dougherty, Judge.

Action by one Cannon against McGrew and others to restrain the obstruction of an alleged right of way. There was judgment for defendants and plaintiff appeals. **Affirmed**.

C. S. Farquar for appellant; Haskell & Meyer and D. R. Gale for respondents.

PER CURIAM.—The plaintiff is the owner of certain lands adjoining those of the defendants, and claims to have a right

of way through and over the lands of the defendants from his own land to the county road. The present action was brought by him to restrain the defendants from obstructing said right of way, the plaintiff alleging in his complaint that they threaten and intend to close and lock certain gates across the same, and prevent him from passing or repassing thereon, or in any manner using the same. The defendants in their answer deny that the plaintiff has the right of way claimed by him, or any right of way or easement over their lands, and upon the trial of this issue the court found in favor of the defendants, finding as a fact that the use of the way over the defendants' land by the plaintiff had at all times been by the permission or license of the defendants and their predecessors in interest, and had never been adverse to them. The evidence of the respective parties upon this issue was directly in conflict, and the finding of the court thereon is not open to review.

Exceptions were taken at the trial to certain rulings of the court upon the admission of evidence, but, as the evidence in respect to which these rulings were made was of such a nature that a different ruling could not have changed the result, it is unnecessary to consider whether they constituted technical error. The judgment and order are affirmed.

UNION TRANSP. CO. v. BASSETT et al.*

No. 15,899; October 15, 1896.

46 Pac. 907.

Harbor Commissioners—Review of Regulations by Courts.—

Under Political Code, section 2524, authorizing the state harbor commissioners to make "reasonable" regulations concerning the management of the property intrusted to them, and to assign suitable wharves for the exclusive use of vessels, the courts may review the regulations of said commissioners, and declare them invalid, if unreasonable.

Harbor Commissioners—Reasonableness of Regulations.—

Whether a regulation of the board of state harbor commissioners changing the docking place of a steamboat company, and requiring

*For subsequent opinion in bank, see 118 Cal. 604, 50 Pac. 754.

it to land its passengers and freight at a different wharf from that to which it had previously been assigned, is unreasonable, is a conclusion of law, to be deduced by the court from the facts proved.

Harbor Commissioners—Restraining Regulations.—In an Action to Enjoin the state harbor commissioners from enforcing a resolution requiring plaintiff steamboat company to change its landing place from the C. wharf to the M. wharf, four hundred yards distant, it appeared that nearly all the freight carried by plaintiff and its competitors consisted of wheat and flour, which the shippers generally required should be delivered at the B. and C. wharves, near which the market for produce of this kind had been established for more than ten years; that, as there was no sale for such produce at or near the M. wharf, carriers could not procure it as freight to be delivered there; that there was active competition for freight between plaintiff and another carrier, which had a landing place at the B. wharf; that said order, if executed, would discriminate against plaintiff, to its great detriment, and compel it to suspend business as a carrier of freight on that route; and that, though the C. wharf was overcrowded, there were boats, other than plaintiff's, which might be removed without prejudice to their interests. Held, that the resolution was unreasonable, and its execution would be enjoined.

Harbor Commissioners—Action to Enjoin Resolution.—In an action to restrain the state harbor commissioners from enforcing a resolution requiring plaintiff steamboat company to change its landing place, the testimony of plaintiff's secretary as to a conversation with one K., in which the latter suggested that he could, for a consideration, effect a compromise, was inadmissible, there being nothing to show that K. was in any way connected with defendants, or that they authorized or knew of his proposal to plaintiff.

Harbor Commissioners—Action to Enjoin Resolution.—In an action to restrain the state harbor commissioners from enforcing an order requiring plaintiff steamboat company to change its landing place, the admission of hearsay evidence tending to impugn defendants' good faith in passing the order of removal is harmless, if the court finds that the order is unreasonable, since such finding warrants the relief sought, irrespective of the motives of defendants.

APPEAL from Superior Court, City and County of San Francisco; William T. Wallace, Judge.

Action by the Union Transportation Company against Charles Bassett and others, composing the board of state harbor commissioners, to enforce the execution of a resolution passed by said board. From a decree for plaintiff and from an order denying a motion for a new trial defendants appeal. Affirmed.

F. S. Stratton and Tirey L. Ford for appellants; Reddy, Campbell & Metson for respondent.

VANCLIEF, C.—The plaintiff is a corporation organized under the laws of this state for the purpose of carrying passengers and freight on steamboats to be run upon the navigable waters of this state, and especially between the cities of Stockton and San Francisco. In February, 1892, plaintiff applied to the defendants for a suitable berth for their boats at some one of the wharves under their control or supervision at the waterfront of the city of San Francisco. Thereafter, on June 8, 1892, the defendants assigned and set apart berth room for plaintiff's boats at and upon Clay street wharf, which plaintiff thereafter occupied and used as a landing place for its boats, and by discharging freight thereon and receiving passengers and freight therefrom daily, until the commencement of this action. On August 2, 1892, the board of harbor commissioners adopted a resolution by which their former order assigning berths to the steamers of the plaintiff at Clay street wharf was rescinded, and berths were assigned to them on Mission street wharf, to be selected by an agent of the plaintiff and the chief wharfinger. This order was opposed and protested against by the plaintiff on the ground stated in the complaint, and was immediately followed by a protest, signed by about forty firms of produce and commission merchants, as follows:

"Gentlemen: We, the undersigned, produce and commission merchants of San Francisco, learning that steps are being taken to remove the steamers of the Union Transportation Company from Clay street wharf to Mission street wharf, most earnestly protest against such change, for the following reasons: First. The center of the produce and commission business in San Francisco is, and has been for many years, on Jackson, Washington, and Clay street wharves, and it would be injurious to such business to have steamers bringing produce to land as far away as Mission street. Second. It is for the interest of the general public, as well as ourselves, to have a competing line of steamers on the San Joaquin river; and, if the Union Transportation Company's line of steamers should be compelled to go to Mission street wharf, it would preclude the possibility of our having produce shipped by that line, as we would be unable to dispose of it at Mission street wharf. Third. From actual experience, it has been

proven that to undertake to transfer the produce business to Mission street wharf results in destroying that business. Wherefore, we most respectfully ask that the steamers 'Captain Weber' and 'Dauntless' be permitted to land at Clay street pier, as heretofore."

On August 25th the board passed another resolution relating to the same matter, as follows: "On motion of Mr. Alexander, seconded by Mr. Brown, the following resolutions were adopted: Resolved, that any use heretofore permitted of the Clay street wharf, on the harbor front of city and county of San Francisco, by the Union Transportation Company, a corporation, for the docking of its vessels at said wharf, and the use thereof by said company of any portion of said wharf for wharfage or other purposes, be, and the same is hereby terminated. This resolution to take effect, and such use terminate, on Tuesday, the 27th day of September, 1892. Resolved, further, that said company be notified at least thirty days prior to said September 27th of said notice and resolution, and termination on that day, and of such use; that on said day such further proceedings, by resolutions or otherwise, will be taken to render effectual the termination of any use by said company. Also, that a copy of this resolution be served by the chief wharfinger, or secretary or assistant secretary of this board, on the president, secretary, manager, or other officer or agent in charge of said company's affairs in this city and county; and that a copy be forthwith addressed by mail to said company, at Stockton, California. Resolved, further, that the chief wharfinger be, and he is hereby, instructed to execute the purposes of this resolution, and of any further resolutions hereafter passed in the premises. Resolved, that, after September 27th next, said company be assigned to the use of Mission street wharf, at such berth or place to be mutually agreed upon by the chief wharfinger and agent of said company: provided, however, that nothing in the resolution contained shall be intended or construed as giving or granting to said company any right to the use of said wharf other than that they may now have, or may have already had, by operation of law."

On October 5, 1892, this action was commenced to enjoin the defendants from enforcing said resolutions and orders; and such injunction pendente lite, or until the further order of the court, was then issued and served on defendants. The

grounds for the injunction are stated in the complaint as follows: "That the character of the freight carried by plaintiff is of that nature as to absolutely require its delivery and receipt upon or at the Clay street wharf (or the Washington street wharf, which is the next adjacent wharf thereto), and that those for and from whom it is possible for plaintiff to get freight to carry on said steamers cannot and will not furnish or give any goods, produce or substance to plaintiff, or anyone else engaged in the same or other business, who cannot or will not deliver and receive the same at either of the wharves above named; and it has been the custom for more than ten years last past to receive goods and produce of the character carried by plaintiff at said wharves. That plaintiff, relying upon said order of defendants giving it berth room at said Clay street wharf, made and entered into a large number of freight contracts and agreements with other persons to hereafter carry to and from, and receive and deliver upon, said Clay street wharf, large quantities of freight, for the carriage of which it is to receive large sums of money from said patrons. That during the times herein mentioned the plaintiff has been, and now is, actually engaged in sharp and active competition with other corporations and persons who have had, and now have, berth room at the wharves above mentioned, and who are now engaged in the same business as plaintiff. That said defendants have unreasonably, arbitrarily, and without any cause or reason whatever, save for the purpose of discriminating against plaintiff, and giving to its competitors an advantage over it, made an order and passed a resolution changing the berth and landing-place of plaintiff's said steamers from said Clay street wharf to Mission street wharf, which said last-mentioned wharf is distant quite a long way southerly from said Clay street wharf, and is entirely outside of the district within which plaintiff can get any freight or passengers to carry on or continue its business with said patrons, as the said Mission street wharf is so situated that neither passengers, nor persons shipping the character of freight that plaintiff carries, will patronize any vessels landing at the same. And plaintiff further alleges that the going to and coming from said Mission street wharf will be attended with great danger to life and property. And, upon information and belief, plaintiff alleges that said order was made by said defendants arbitrarily, and for the

purpose of injuring and damaging plaintiff, and for the purpose of discriminating against plaintiff in the conducting and carrying on its said business, and to prevent it from carrying on the said business, and to prevent plaintiff from exercising its rights as a common carrier, and to prevent it from carrying freight and passengers from and to the city of San Francisco, and to utterly ruin and destroy its business, and render its property useless and of no value, in order that its competitors in said business aforesaid should thus obtain advantage over plaintiff, and that plaintiff should be driven entirely out of business. Plaintiff further alleges that said defendants have notified plaintiff that it must immediately cease landing at said Clay street wharf, and that it must hereafter land at and receive and unload freight from its said steamers at the said Mission street wharf, and not elsewhere. Plaintiff further alleges that the effect of said order, if enforced, will be to drive plaintiff out of the business entirely, and will also make it liable to be proceeded against for breach of contract by the various persons with whom it has contracted to receive, deliver and carry freight from and to said Clay street wharf for a failure to do so, and that said order is unjust, unreasonable and unfair, and was not made for the convenience of the public, but will kill and prevent all competition in the future, and will compel plaintiff to hang up its boats and vessels, if the said order is carried into effect." The answer of defendants denies the allegations of the complaint relating to the grounds upon which the injunction was asked.

The court, without a jury, found the facts and conclusion of law as follows:

"Finding of Facts. All and singular the allegations contained and set forth in the complaint, and in the amendment to the complaint, at the trial, are true in point of fact, and were true at the commencement of the action. The order made by the defendants in the month of August, 1892, purporting to change the docking place and berth room of the plaintiff's boats from Clay street, where they then were, was arbitrary, and was made without any just cause, and without any reason or motive therefor on the part of the defendants, other than that of injuring and damaging the plaintiff in its transportation business, and to assist others, its rivals and competitors in the business, in forcing the plaintiff

to discontinue the running of its said boats. The orders and action of the defendants in and about the removal of the plaintiff's said boats from said Clay street wharf were not made or taken by the defendants for any reason or upon any ground or with any intent such as they have alleged in their answer therein, but were made only with the intent and for the purpose on their part as is alleged in the complaint in their behalf.

"Conclusion of Law. There must be a decree for the plaintiff as prayed in the complaint, and it is so ordered."

A final decree was entered in accordance with these findings. The defendants' motion for a new trial having been denied, they have appealed from the final decree, and also from the order denying their motion for a new trial.

Appellants contend that none of the findings of fact from which the conclusion of law was drawn are justified by the evidence. The evidence is voluminous, occupying two hundred and seventy pages of the printed transcript. Then there are twenty-six specifications of insufficiency of evidence, occupying nine pages, and consisting principally of statements of "what the evidence fails to show." Eleven of these specifications apply to issues tendered by the affirmative allegations in the answer of the defendant; and these specifications are "that the evidence fails to show" that any one of such affirmative allegations in the answer is true, and that none of such allegations are justified by the evidence. All this, however, is in perfect accord with the findings of the court. Perhaps the attorney for defendants did not intend what he plainly said in these so-called specifications, and they are here referred to only for the purpose of calling attention to the incoherency, indefiniteness and tiresome prolixity of the statement on motion for new trial. Then there are forty-nine specifications of errors in law, occupying fifteen pages. The principal specification of insufficiency of evidence urged here is that the evidence is insufficient to justify the finding that the order for the removal of plaintiff's boats was unreasonable and unjust. This, however, is not a fact, but, in cases of this kind, is a conclusion of law, deduced by the court from the facts and circumstances proved: Dill. Mun. Corp., 4th ed., sec. 327; Ex parte Frank, 52 Cal. 610, 28 Am. Rep. 642. The facts and circumstances found by the court surely support the conclusion of law that

the order of the board removing plaintiff's boats was unreasonable and unjust. What were the findings of fact which support this conclusion of law? And were such findings justified by the evidence? The material substance of these findings is as follows: That nearly all the freight carried to San Francisco by plaintiff and its competitors consists of that kind of produce of land, exclusive of wheat and flour, which is customarily landed and delivered at the Clay street and Washington street wharves, and which is generally, by the shippers thereof, required to be delivered at those wharves, for the reason that the market place for such produce, for more than ten years, has been concentrated and established at and near those wharves, and that carriers could not procure such produce as freight, to be delivered at Mission street wharf, because it is four hundred yards south of Clay street wharf, where such produce is seldom delivered, sold or called for; that, from the time plaintiff commenced to run its boats (June 8, 1892) until it was ordered to remove from Clay street to Mission street, there was an active and sharp competition for freight between plaintiff and another line of boats on the same route, and having a landing-place at Washington street wharf, to wit, the California Navigation and Improvement Company; that the order of removal unfairly and unnecessarily discriminated between plaintiff and said California Navigation and Improvement Company, to the great detriment of the former and advantage of the latter, and that said order was arbitrarily made, without just cause, and for the purpose of thus discriminating against plaintiff and in favor of its competitor, and not for the purpose or with the intent alleged in the answer of the defendants; and that, if executed, the order for removal would compel plaintiff to suspend the carrying business on said route, to its great and irreparable injury. I think these findings are supported by a considerable preponderance of evidence, except in so far as they may tend to impute dishonest motives to the commissioners, but that, independently of the motives of the commissioners, the findings support the judgment.

The powers of the commissioners are defined, and their duties prescribed, so far as they relate to the subject of this action, by section 2524 of the Political Code, as follows: "The commissioners shall have possession and control of that portion of the Bay of San Francisco [described], together

with all the improvements, rights, privileges, easements and appurtenances connected therewith, or in anywise appertaining thereto, for the purposes in this article provided. . . . The commissioners shall have power to make reasonable rules and regulations concerning the control and management of the property of the state which is intrusted to them by virtue of this article; . . . [shall] set apart and assign suitable wharves, berths, or landings for the exclusive use of vessels." "Where the legislature, in terms, confers upon a municipal corporation the power to pass ordinances of a specified and defined character, if the power thus delegated be not in conflict with the constitution, an ordinance passed pursuant thereto cannot be impeached as invalid because it would have been regarded as unreasonable if it had been passed under the incidental power of the corporation, or under a grant of power general in its nature. In other words, what the legislature distinctly says may be done cannot be set aside by the courts because they may deem it to be unreasonable, or against sound policy. But where the power to legislate on a given subject is conferred, and the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power, or it will be pronounced invalid": Dill. Mun. Corp., sec. 328. Under the rule thus expressed by Judge Dillon, even if the power to make regulations and to assign berths and landing places to vessels had been given to the harbor commissioners without any express qualification, it would nevertheless have been subject to the limitation that such regulations and orders assigning berths, etc., must be reasonable, otherwise invalid. The legislature, however, did not leave this limitation upon the power of harbor commissioners dependent on implication, but expressly limited it to the making of reasonable regulations, and to the setting apart of suitable wharves, berths, etc., to vessels. Therefore it cannot be doubted that the courts may review the regulations and orders of the harbor commissioners in respect to the requisite attribute of reasonableness, and pronounce them invalid if found to be unreasonable. As applicable to this point, see, also *Ex parte Frank*, 52 Cal. 606, 28 Am. Rep. 642; *Ex parte Kearny*, 55 Cal. 225; *Spring Valley Waterworks v. City of San Francisco*, 82 Cal. 286, 16 Am. St. Rep. 116, 6 L. R. A. 756, 22

Pac. 910, 1046; Mayor etc. of Baltimore v. Radecke, 49 Md. 217, 33 Am. Rep. 239; Tugman v. Chicago, 78 Ill. 405; Dill. Mun. Corp., sec. 319 et seq., and notes.

It is urged by the defendants that the slip between Clay street wharf and Washington street wharf, in which plaintiff's boats were first assigned a berth, was overcrowded, and for that reason it was absolutely necessary that some of the boats should be removed therefrom to some other wharf. Conceding this, it does not appear that it was necessary to remove plaintiff's boats to another wharf which was unsuitable to its business. On the contrary, it appears that at least two other boats that occupied berths in said slip, to wit, the "General McDowell," a government boat, and the steamer "Humboldt," might have been removed to other wharves suitable to their business, and without prejudice to their interests. When asked why they determined to remove plaintiff's boats, rather than one of the other lines, Mr. Alexander, a member of the board, answered: "To move the other vessels would not accomplish what we wanted to accomplish particularly. The 'Humboldt' had already been moved once. She had been moved from her place at Clay street to Washington, and even if it accomplished the object, I don't think the board would be inclined to move her from pillar to post." No reason was given why the "General McDowell" could not have been removed. What object the board "wanted to accomplish particularly," other than to relieve the crowded condition of Clay street wharf, appears only by the further testimony of Mr. Alexander, who said: "The condition of that part of the city was becoming so crowded, we recognized the fact it was necessary to distribute this line of business [produce business] all over the city. To concentrate it for the next twenty years is out of the question." Yet the policy of the law creating and governing the harbor commission seems to favor the concentration of each kind of business, and it is obvious that the public would be better accommodated by such concentration. One who desires to buy a particular kind of goods, say lumber, coal, fish or farm produce, must find it very inconvenient to travel two or three miles along the waterfront to ascertain where he can buy to the best advantage. Therefore, I think the court properly found against the plea of necessity.

It is urged that the courts will not declare an order or regulation of the governing board of a municipal corporation void, except in a plain case of abuse of authority. Conceding this, it does not follow that the courts are powerless to give relief in all cases where the evidence is conflicting, though it may be admitted that the appellate court should scrutinize the evidence more closely in cases of this kind than in ordinary cases, and require the record to show a satisfactory preponderance of the evidence in favor of the findings of the trial court. In other words, the findings of fact from which the unreasonableness of the order, regulation or by-law is deduced should clearly appear to be justified by the evidence, and the facts found should clearly warrant the conclusion of unreasonableness; and such, I think, are the conditions shown by the record in this case. Indeed, there is no substantial conflict of evidence, except upon the issues as to the necessity of the order of removal above considered, and as to the extent of the injury to plaintiff. Speaking of the injurious effect of the order of removal on the business of plaintiff, Mr. Alexander said, "The opinion of the board was—and my individual opinion—that at first it might be something of a hardship upon them to move, but we believed in time they could build up a business." And it was not denied that the effect of the removal might be such as alleged in the complaint and found by the court.

Of the forty-nine specified errors in law, the only one urged here is that the court erred in admitting certain hearsay evidence. C. M. Keniston, a witness for plaintiff, was permitted to testify to a conversation he had with a Mr. Knapp after the final order of removal was made. The testimony was objected to on the ground that it was irrelevant, immaterial and mere hearsay. The objectionable testimony was, in substance: That Knapp said to Keniston, who was the secretary of the plaintiff corporation, that he (Knapp) believed it possible that all the factions could be compromised so that plaintiff could be allowed to remain at Clay street wharf; that he knew more about the case, probably, than anyone else; that he thought he was in a position to compromise the matter, but, of course, it would require money to do it—he thought, about \$2,000; parties would have to be fixed up, in order to allow plaintiff to remain at Clay street wharf. That Knapp repeated the substance of the above to Mr. Gillis, the

president of the plaintiff, and that witness and Mr. Gillis declined to pay any sum for the purpose of effecting a compromise. It appeared that Knapp had acted as the private detective for the California Navigation and Improvement Company about two years immediately preceding this conversation with Keniston, and that he had assisted in procuring the order removing plaintiff from Clay street wharf; but there is nothing in the evidence tending to prove that he was in any wise connected with the defendants, nor that any one of the defendants authorized, or even knew of, his proposals to Keniston or Gillis. That this testimony of Keniston was not only mere hearsay, but irrelevant and immaterial, and for these reasons should have been rejected, admits of no doubt, but that defendants were not injured thereby seems quite as clear. The only possible effect it could have had was to cast a mere suspicion upon the motives and good faith of the defendants; but, as above remarked, the judgment rests firmly on the finding that the order of removal was unreasonable and unjust, independently of the motives or good faith of the commissioners, and must have been the same whether their motives were good or bad. The relief asked and given may be regarded as indivisible, and such as must have been wholly given or entirely denied, and could not have been diminished or affected by proof of good faith of defendants. The following cases were cited to the point that the hearsay evidence was harmless, and that the judgment should not be reversed for the error of admitting it: *Norwood v. Kenfield*, 30 Cal. 394; *Kisling v. Shaw*, 33 Cal. 425, 91 Am. Dec. 644; *Mott v. De Reyes*, 45 Cal. 380; *De La Guerra v. Newhall*, 55 Cal. 21; *Silverer v. Hansen*, 77 Cal. 579, 20 Pac. 136; *Jones v. Tallant*, 90 Cal. 386, 27 Pac. 305; *Clavey v. Lord*, 87 Cal. 413, 25 Pac. 493.

The decree enjoins the board from enforcing the order of removal to Mission street, "and from unlawfully requiring plaintiff to dock its boats elsewhere than at said Clay street wharf." Appellants contend that this gives the plaintiff a perpetual vested right to dock at Clay street wharf and enjoins defendants from interfering therewith for any cause. But such is not the meaning of the decree. The board is not enjoined from removing plaintiff's boats from Clay street wharf for any lawful cause, nor from making any reasonable

regulation or order. I think the judgment and order appealed from should be affirmed.

We concur: Searls, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

LASSEROT v. GAMBLE.

S. F. No. 483; October 15, 1896.

46 Pac. 917.

Forcible Detainer—What Constitutes.—A Lease Provided That on Failure of the lessee to perform certain covenants the lessor might recover possession without notice or demand. After the lessee had been in peaceable possession for several months, the lessor, claiming a violation of the lessee's covenants, ordered him to leave the premises, but did not give the written notice required by Code of Civil Procedure, sections 1161, 1162. On the lessee's refusal to leave, the lessor had him arrested on a warrant charging a public offense, and during his absence took possession, without the consent of the employee in charge, and refused to surrender possession to the lessee for more than five days after demand therefor. Code of Civil Procedure, section 1160, provides that a person who, during the absence of the occupant, unlawfully enters on real property which for more than five days prior thereto has been in the peaceable possession of such occupant, and refuses to surrender for five days after demand therefor, is guilty of forcible detainer. Held, that defendant was liable under said act.¹

Forcible Detainer—Evidence.—In an Action Against said lessor by the lessee for forcible detainer it was competent to show that plaintiff was arrested at defendant's instance, for the purpose of getting him away from the premises, so that defendant might enter and take possession thereof.

Forcible Detainer—Evidence.—In Forcible Detainer, under Code of Civil Procedure, section 1160, evidence of title in defendant is inadmissible.

APPEAL from Superior Court, Santa Cruz County; J. H. Logan, Judge.

¹ Cited in the note in 121 Am. St. Rep. 378, 400, 405, on the right to a civil action for forcible entry and detainer,

Action by Peter Lasserot against A. W. Gamble for the forcible detention of certain lands. From a judgment for defendant and from an order refusing a new trial plaintiff appeals. Reversed.

Charles B. Younger and Spalsbury & Burke for appellant;
W. D. Storey for respondent.

BELCHER, C.—This is an appeal from a judgment and order refusing a new trial. No brief has been filed on behalf of the respondent. The action is for the forcible detention of certain lands and premises in Santa Cruz county known as the "Gamble Place." The complaint alleges that on the first day of December, 1893, the plaintiff was in the actual, peaceable and undisturbed possession of the said lands and premises, and that, while plaintiff was in such possession, and during his absence from said premises, the defendant, on the day named, unlawfully, and against plaintiff's will, and without his consent, entered upon said premises, and ousted and ejected plaintiff therefrom, and ever since unlawfully, wrongfully, forcibly and against plaintiff's will has held, and still holds, possession of the same; that on the thirtieth day of January, 1894, and before the commencement of this action, plaintiff made demand of defendant that he forthwith surrender the said premises and the possession thereof to plaintiff, but defendant, for more than five days after said demand, refused, and still refuses, to surrender the same. The complaint also states that on December 1, 1893, plaintiff was in possession of certain personal property on the said premises, which was then and there and theretofore used by him in the cultivation, farming and use thereof, and that defendant then and there wrongfully and unlawfully seized and took possession of all of said personal property, and converted the same to his own use, to the plaintiff's damage, etc. The answer denies that on the first day of December, 1893, plaintiff was in the peaceable or undisturbed possession of the said real property or of the said personal property, with certain specified exceptions, and alleges that all of said real property and all of said personal property, omitting the excepted articles, was the property of defendant on said day, and that he was then entitled to the possession thereof. The answer further al-

leges that defendant took possession of all of said property, excepting the said enumerated articles, rightfully and in accordance with the consent and agreement of plaintiff theretofore expressed and entered into by him, and denies that plaintiff has been damaged in any sum whatever by being deprived of said real or personal property. The answer then sets out a lease of the said premises alleged to have been executed by defendant to plaintiff on the twenty-eighth day of June, 1893, for the term of three years and four months, commencing on the first day of July, 1893, and ending on the first day of November, 1896. The lease provides that: "The party of the second part is to stock said ranch with the seven cows and six calves now on said ranch, and the party of the first part is to furnish an equal number of cows, or others of equal value, on or before the first day of December next. Each of the parties are to furnish half of the necessary seed and feed and half of the hogs necessary to consume the grain or other products of said ranch, and each is to pay half the cost of repairing the agricultural implements used on said ranch. The party of the first part is to furnish materials for making and keeping the necessary fences in repair. The party of the second part agrees to furnish labor and work said ranch and dairy well, and to make and keep the necessary fences in good repair during the continuance of this lease; to market and dispose of such of the products of the dairy and ranch as both of the parties may from time to time agree to; to keep a full and correct account of such sales, yielding to the party of the first part a correct copy thereof, and paying him one-half of the proceeds thereof on the first day of each and every month during the continuance of this lease; and as compensation for the crop now on said ranch the party of the second part agrees to pay to the party of the first part, on or before the first day of November next, the sum of \$400 out of the proceeds of the sales of the hogs or other products of said ranch, such amount being in excess of the half due said party of the first part. . . . And the said party of the second part covenants with the said party of the first part that if, at any time during the continuance of this lease, he should fail or refuse to comply with the covenants herein made by him, or in any part thereof, this lease shall at once become void, and the party of the first part may

recover possession as if the same was withheld by forcible detainer; the party of the second part hereby waiving the right of any notice or demand for the possession of said premises." After setting out the lease, the answer alleges: "That plaintiff, before December 1, 1893, utterly failed and neglected to perform and comply with the covenants on his part to be performed under said agreement, and willfully and grossly violated said covenants." It then states how plaintiff failed to comply with the conditions of the lease in several respects; that by reason of his said acts of neglect and his violation of said covenants defendant had been damaged in the sum of \$1,000; and that, after the violations of plaintiff's covenants, and on or about December 1, 1893, defendant notified plaintiff that said agreement was void, and thereupon took peaceable possession of said farm and the said personal property. The case was tried before a jury, and the verdict and judgment entered thereon were in favor of the defendant.

The statement contains numerous specifications of the particulars in which it is claimed the evidence was insufficient to justify the verdict, and also many specifications of errors in law occurring at the trial, and excepted to by the plaintiff; but most of these specifications need not be considered. It is alleged in the complaint, and not denied by the answer, that plaintiff was in the actual possession of the property when the defendant entered upon the same, and took possession thereof. It is also alleged, and not denied, that plaintiff afterward demanded of defendant that he forthwith surrender to plaintiff the possession of the said property, and that defendant, for more than five days after said demand, refused, and ever since has refused, and still refuses, to surrender the same.

The circumstances under which defendant took possession of the property were shown to be as follows: Plaintiff testified: "I went there about June 1, 1893, and took possession of the place at that time. I had two men—John Lovely and Richard Lair—working for me. On or about November 29, 1893, I went to Pescadero, and got provisions for the ranch, and returned to the ranch with the provisions. Defendant was at the ranch when I returned. We had supper, and the constable came after supper, and defendant

wanted to know if I would leave the place. I said I would not. The constable then arrested me, and required me to go to Justice Craghill's court at Santa Cruz, about twenty miles distant. I gave bond on Saturday evening, but on Sunday one of my bondsmen withdrew from the bond, and I was committed to the county jail in Santa Cruz, and was confined there continuously for fifty-seven days. When I left the premises described in the complaint, I left Lovely in charge of them. I told Lovely, in case I did not come back, to keep possession, and not let anybody have possession of the place. I was in possession of the place. I had peaceable and undisturbed possession of the place up to the time I was arrested by the constable as stated above." And John Lovely testified: "I was at the ranch when defendant came and took possession. Plaintiff was then in jail in Santa Cruz. Defendant came to the ranch after plaintiff was taken to jail, and defendant said to me: 'Frenchie, I want to get in the house to take out some of my things.' I opened the door, and defendant went in. After defendant got in, he said to me: 'You give me possession, and I will give you some money.' Defendant then took down the stovepipe, and asked me to help him move the stove; but I said I would not. I told defendant that I would not give possession to him, or to any other man. Defendant took the dishes and the stove out of plaintiff's room. Defendant then went out, and after a while I thought he was gone, and I went out, and he came back, and fastened the door. I did not give defendant permission to take possession. He took it without my consent. I could not get back in the house. I had nothing to eat. Plaintiff had put me in charge of the place, and told me to take care of it, and not to allow anybody to get possession of it. I had to go away to get something to eat, and defendant would not let me in again. . . . When plaintiff went away, he left me plenty of provisions. After defendant took possession of the place, he threatened to have me arrested if I broke into the house." The plaintiff sought to prove that he was arrested at the instance of the defendant, and to that end he asked defendant, when on the stand as a witness: "Was plaintiff arrested at your instigation?" And again: "Did you not cause plaintiff to be arrested in order to get him off the place?" Both questions were objected

to by defendant, though upon what ground does not appear, and the objections were sustained. Afterward plaintiff offered in evidence the complaint on which the warrant for his arrest was issued, but upon like objection it was also excluded. A copy of the complaint is set out, from which it appears that it charged the plaintiff with a public offense, and was sworn to by defendant on December 1, 1893. The obvious purpose of this offered evidence was to show that the arrest of plaintiff was a means resorted to to get him away from the place in order that defendant might enter upon and take possession of it, and for that purpose it was competent, and should have been admitted. It is clear that defendant had no right to take possession of the premises as he did, and in doing so he was guilty of a forcible detainer: Code Civ. Proc., sec. 1160, subd. 2. "Under our statute, evidence of title in actions of forcible detainer is inadmissible. 'The inquiry in such cases is confined to the actual peaceable possession of the plaintiff, and the unlawful or forcible ouster or detention by the defendants; the object of the law being to prevent the disturbance of the public peace by the forcible assertion of a private right. Questions of title or right of possession cannot arise. A forcible entry upon the actual possession of plaintiff being proven, he would be entitled to restitution, though the fee simple title and present right of possession are shown to be in defendant': *McCauley v. Weller*, 12 Cal. 524. 'Under the code, all entries on the actual possession of another are unlawful, and the question of good or bad faith on the part of the defendant no longer affects the right of the recovery in this form of action': *Voll v. Hollis*, 60 Cal. 575"; *Giddings v. Water Co.*, 83 Cal. 100, 23 Pac. 198.

The court properly instructed the jury that it did not require the actual personal presence of plaintiff upon the premises to constitute actual possession in him. If his employee was in possession at the time of defendant's entry, his possession was the possession of plaintiff. The court further instructed the jury that the defendant could not lawfully take possession of the premises described in the complaint against the will or consent of plaintiff, unless he had given plaintiff three days' notice in writing, as provided in sections 1161, 1162 of the Code of Civil Procedure. Under these circumstances the verdict should have been for

the plaintiff, and the judgment and order appealed from should be reversed and the cause remanded.

We concur: Searls, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are reversed and the cause remanded.

SPENCE v. WIDNEY et al.*

L. A. No. 6; October 16, 1896.

46 Pac. 463.

Trusts—Death of Trustee.—Plaintiff's Testator Granted lands in trust to six trustees, to be sold, etc., with the approval of any four of them, and the fund derived therefrom to be used for founding an astronomical observatory. Before anything had been done to carry out the trust, three of the trustees died. Held, that under Civil Code, sections 2288, 2289, providing that on the death of one of several cotrustees the trust survives to the others, and that the superior court in the county in which the property is situated may appoint other trustees of the trust, the trust did not terminate as impossible of fulfillment.

Trusts—Unreasonable Delay in Carrying Out.—Plaintiff's testator granted land in trust to six trustees, the fund derived therefrom to be used in founding an astronomical observatory in connection with a university. Lenses were ordered, but it was found that the income was insufficient to pay for them. With the consent of the grantor the lenses were sold, and it was decided to wait until prices could be realized for the lands which would enable the trust to be accomplished. Held, that under the circumstances a delay of three years in taking further steps to carry out the trust was not unreasonable.

Trusts—Death of Grantor.—In Such Case the Deed Provided that the observatory should be located on Wilson's Peak, or some other suitable site on the Sierra Madre range, to be selected by the consent and approval of the grantor, who was also one of the trustees. Held, that the death of the grantor before any selection was made did not defeat the execution of the trust.

Trusts—Abandonment.—The Sale of the Lenses and the Delay in selecting a site for the observatory cannot, in the absence of any

*Rehearing granted.

express declaration to that effect, be construed as an abandonment of the trust.

A Trust for the Founding of an Astronomical Observatory in connection with a university, "to be owned, controlled, and managed by said university," will not be construed as a trust for a private corporation, and therefore void, in the absence of anything to show whether the beneficiary is an educational institution for the benefit of the public, or conducted for mere private ends.¹

Trust for Astronomical Observatory—Perpetuity.—Nor will the trust be declared void as creating a perpetuity unless it appear that the beneficiary is a mere private enterprise and not a public charity.

APPEAL from Superior Court, Los Angeles County; J. W. McKinley, Judge.

Action by Anna M. Spence, executrix of the last will of E. F. Spence, deceased, against J. P. Widney and others, to set aside a conveyance in trust. From a judgment for plaintiff and from an order denying a new trial defendants appeal. Reversed.

Cochran & Williams (Henry Bleecker of counsel) for appellants; Bicknell & Trask and Chapman & Hendrick for respondent; Albert H. Stephens for intervener.

PER CURIAM.—The plaintiff, as the executrix of the last will of E. F. Spence, deceased, brought this action to have canceled and set aside a certain conveyance made on January 22, 1889, by said E. F. Spence to M. M. Bovard, E. F. Spence, H. Sinsabaugh, J. P. Widney, P. M. Green and R. M. Widney, "as trustees of an express trust," upon the ground that the conveyance was void from the beginning, and the further ground that the purposes for which it was made had been abandoned, and the trusts thereby created had become impossible of execution. The court below found the facts and gave judgment as prayed for, from which, and from an order denying a new trial, the defendants appeal.

The conveyance was of certain lots of land in the city of Los Angeles, to be held in trust as follows: "To sell and con-

¹ Citing this case as authority it was said in *Re Sutro's Estate*, 155 Cal. 737, 102 Pac. 923: "But institutions of learning and science may or may not be charitable according as the institution is carried on for public benefit alone or for private gain"; and the court added that a rehearing had been granted in the cited case "but not on this point."

vey or mortgage the same at such time and for such price and on such terms as said second parties, or any four of them, may deem best. The proceeds to be used in purchasing and setting up in first-class working condition the best set of astronomical instruments and telescope that can be purchased with said funds, to be used and known as the 'Spence Observatory of the University of Southern California,' to be owned, controlled, and managed by said university. The rents, income, and profits of said property prior to sale shall be received and collected by M. M. Bovard, one of said trustees, and from same he shall pay taxes, insurance, and such other expenses as may occur in the care and management of said premises, and interest on any mortgage that may be placed thereon. The surplus of said income shall be the property of said M. M. Bovard for his own use and benefit for his services herein. Said observatory to be located on what is known as 'Wilson's Peak,' in the county of Los Angeles, state of California, or some other suitable site in the mountains of the Sierra Madre range, to be selected by the consent and approval of E. F. Spence. In case said property, or the proceeds thereof, shall not be used as herein stated, the said proceeds (except the rents as hereinbefore provided) shall revert to and vest in the said grantor, or his legal representatives." The trust thus created was accepted by all of the six trustees and by the University of Southern California. On April 8, 1889, the six trustees, in writing, authorized Alvin Clark & Sons, of Boston, to contract with M. Mantois, of Paris, for the purchase and delivery of lenses for a forty-inch telescope, at the price of 80,000 francs, to be paid as follows: 20,000 francs to be paid when the first lens should be delivered to and accepted by Clark & Sons in Boston; 20,000 francs more when the second lens should be delivered to and accepted by them; and the remaining 40,000 francs one year after the second payment is due; and it was stipulated that there should be no extra allowance for shortening the time on the work, as the trustees preferred that the work should not be hurried.

The first lens was constructed and sent on to Clark & Sons in Boston, and, for the purpose of raising money to make the first payment, the trustees borrowed from the State Loan and Trust Company of Los Angeles the sum of \$5,500, for which they gave their promissory note, and a mortgage on the trust property to secure payment of the same. Of the money so

raised 20,000 francs were sent on to Paris to meet the first payment. Subsequently the second lens was completed and sent on to Clark & Sons, and a demand for the second payment was made. There was no money in the hands of the trustees to make that payment, and, to determine what should be done, Dr. J. P. Widney, who was then the president of the university, held a consultation with Mr. Spence. After discussing the matter, and considering the difficulty of then raising more money, it was agreed that the lenses were more expensive than was contemplated by the deed of trust, and that it would be better to sell them, and commence over again, and make such contract as the trust property would carry out. Accordingly, with the advice and consent of Mr. Spence, Dr. Widney notified Mr. Clark that they would not go on with those lenses, but would sell them, and purchase afterward such lenses as the property would pay for. Shortly after this arrangement, on September 19, 1892, Mr. Spence died, and prior to his death two of the other trustees, M. M. Bovard and H. Sinsabaugh, had died. The three surviving trustees, on November 19, 1892, sold the lenses to the University of Chicago for a considerable sum over what had been expended for them, and with the money received they paid, among other things, the note and mortgage to the State Loan and Trust Company. During the lifetime of Bovard and Spence the business of the trust was managed largely by them, but mainly by Bovard. After the death of Spence the surviving trustees continued in possession of and cared for the trust property, paying taxes and insurance, and awaiting a favorable opportunity to sell it to the best advantage before taking steps to contract for new lenses and otherwise carry out the trust. On September 7, 1893, the plaintiff commenced this action against the three surviving trustees and the University of Southern California. At that time the places of the deceased trustees had not been filled, the trust property had not been sold, and no definite site for the location of the observatory had been selected. The case was tried in March, 1894, and the court found, among other things, "that the accomplishment of the objects set forth in said trust deed had become impossible, and that said objects and purposes have long since been abandoned, and nothing whatever has been done toward the execution of the said trust for more than three years." It is upon this finding that the judgment rests. This finding

is assailed as not justified by the evidence, and whether it is so justified or not is the principal question presented for decision.

1. After a careful inspection of the record, we are unable to find any evidence which, in our opinion, can be said to justify the finding that the accomplishment of the objects of the trust had become impossible. It is true that three of the six trustees were dead, and that the deed required the concurrent action of at least four. But sections 2288 and 2289 of the Civil Code provide that on the death of one of several cotrustees the trust survives to the others, and that the superior court of the county where the trust property is situated may appoint other trustees, and direct the execution of the trust. And section 2268 of the same code provides that, where there are several cotrustees, all must unite in any act to bind the trust property, unless the declaration of trust otherwise provides. Here the deed did provide that a less number than all might act, and when it was made the grantor must be presumed to have known the law, and also that some of the trustees named might die, and, if so, that their places would be filled by the court, with power in the new board to discharge the duties imposed on the original appointees. And in the provision of the deed we see nothing to indicate that the grantor intended to or did confer upon the trustees named by him any discretionary powers of such a personal character that they could not be exercised by trustees appointed by the court. And the fact that no steps had been taken to have new trustees appointed certainly does not show that the execution of the trust had become impossible. There does not appear to have been any immediate necessity for filling the vacancies, as the three remaining trustees were able to manage and look after the property and were not then ready to sell or mortgage the same.

It is also true that the big lenses had been sold, and the trust property had not been sold, and no new lenses had been contracted for. It appears that the lenses were sold with the consent and approval of the trustor. No definite time was fixed for the sale of the property or the erection of the observatory, and, under the circumstances shown, the delay does not seem to have been unreasonable. So, too, it is true that the observatory had never been located on Wilson's Peak, and no other site for it was ever selected "with the consent and

approval of E. F. Spence," and it does not appear that the trustees had acquired any right to establish an observatory on Wilson's Peak, or on any suitable site in the mountains of the Sierra Madre range. But it does not follow that a suitable and desirable site for the observatory on Wilson's Peak may not yet be selected, and the right thereto acquired. The suggestion of counsel for respondent that there is room enough on that peak for the establishment of "one hundred and fifty to five hundred observatories" only tends to show that there can be no great difficulty in acquiring a site. So the suggestion that, in the absence of a showing to the contrary, all the land on the peak must be presumed to be government land, is no valid argument in support of respondent's position; for, if true, it would seem to be by no means impossible to acquire a site. But, assuming that the location cannot be made on Wilson's Peak, still it does not follow that a suitable site cannot be selected and used on some one of the adjacent peaks. The fact that Spence died before the selection, and therefore it cannot be made with his consent and approval, will not defeat the execution of the trust. When a trust exists, and all the trustees are dead, the court will appoint other trustees, and direct the execution of the trust (section 2289, Civil Code), and in a case like this another site may be selected by the consent and approval of the court.

2. The next question is, Had the objects and purposes of the trust been abandoned? We find no evidence in the record tending to show that they had. Under our code "a trustee must fulfill the purpose of the trust, as declared at its creation, and must follow all the directions of the trustor given at that time, except as modified by the consent of all parties interested": Civ. Code, sec. 2258. And, as such trustee, he has no power to abandon a trust, except as declared therein, for he is "a general agent for the trust property," and "his acts, within the scope of his authority, bind the trust property to the same extent as the acts of an agent bind his principal" (section 2267); and every act of the trustee, in contravention of the trust, is absolutely void: Sec. 870. "A trust cannot be revoked by the trustor after its acceptance, actual or presumed, by the trustee and beneficiaries, unless the declaration of trust reserves a power of revocation to the trustor, and in that case the power must be strictly pursued": Sec. 2280. The law seems, therefore, to be well settled that a trustee can-

not abandon a trust without the consent of the cestui que trust, for, as said in *Perry on Trusts* (section 268, fourth edition): "If a person has once accepted the office, either expressly or by implication, it is conclusive; and he cannot afterward, by disclaimer or renunciation, avoid its duties and responsibilities." Aside from the fact that the trustees had sold the large lenses which were first made, and had delayed to select a site for the location of the observatory and to contract for other lenses, there is no evidence showing that they ever intended to or did abandon the trust. On the contrary, the evidence is clear and undisputed that they had at all times intended to go ahead with the work, and were waiting only for a favorable time and circumstances to accomplish the end proposed. So, also, there is no evidence showing that the university, as beneficiary, ever consented to the abandonment of the trust. On the contrary, the only evidence introduced upon the subject is that it never did so consent, but insisted and relied upon its execution, and that when this action was commenced it employed counsel to defend it.

3. Respondent contends that the deed is void ab initio, because the trust created thereby is a mere private trust for the benefit of a corporation, and not a trust for charity. It is well established that a trust for the promotion of education or science, such as the establishment of a school or a chair in a university, is a trust for charity, as that term has been interpreted in modern jurisprudence: *Jackson v. Phillips*, 14 Allen, 539; *Perry on Trusts*, sec. 687; *Pomeroy's Equity Jurisprudence*, sec. 1023. This does not embrace, however, trusts for the benefit of such institutions as are strictly private, and conducted for mere private gain (*Pomeroy's Equity Jurisprudence*, sec. 1023); but the institution must be public, or for the benefit of some portion of the public (*Attorney General v. Soule*, 28 Mich. 153). In this case the trust is to establish with the proceeds of the trust property an observatory, "to be used and known as the 'Spence Observatory of the University of Southern California,' to be owned, controlled, and managed by said university." But there is an entire absence from the pleadings, and findings as well, of anything to indicate the character or purposes of the beneficiary, other than that to be inferred from its name, excepting only the fact that it is a corporation duly incorporated under the laws of the state. Whether it is a school or educational institution,

and, if so, whether it is for the benefit of the public, or run for mere private ends, nowhere expressly appears. That it was such an institution as would support the trust seems to have been tacitly conceded in the court below, and the point that it is not such is made here for the first time. But, as there is nothing in the record from which the fact is made to appear, and as we are aware of no presumption for or against the competency of the beneficiary to take the use, the question of the validity of the deed in this respect cannot be determined upon this record. The question, however, being one upon which the validity of the deed may turn, it will be the duty of the court below upon another trial to find expressly upon the fact. Since trusts are not favored in the law, the burden will be upon the party seeking to sustain the trust to show that it is within the exception of the statute.

4. The further contention that the deed is void because the accomplishment of the trust would require the creation of a perpetuity, is fully met, if the beneficiary shall be found to be a charity, by the decision in *Re Hinckley's Estate*, 58 Cal. 457, where it was held that trusts for perpetual charitable uses are not in conflict with the constitution of the state, nor with those provisions of the Civil Code which prohibit perpetuities; and, further, that perpetuities prohibited by the common law do not include trusts for charitable uses. And see *In re Robinson's Estate*, 63 Cal. 620; *People v. Cogswell*, 113 Cal. 129, 35 L. R. A. 259, 45 Pac. 270.

The judgment and order are reversed and the cause remanded for a new trial.

Beatty, C. J., not participating.

McFARLAND, J.—I dissent. I see no sufficient reason for disturbing the judgment. Waiving the point made by respondent that the alleged trust was void from the beginning because it is not taken out of the category of perpetuities by being a charity, and other points going to its intrinsic invalidity, I think that the findings that the accomplishment of the purposes of the trust has become impossible, and that said purposes have been abandoned, are just conclusions from the facts. In fact, the evidence does not present a single existing monument to mark any effort to carry out the purpose of the trust; and, so far as the accomplishment of that purpose is concerned, the situation is the same to-day as it was the day

Mr. Spence executed the deed. All that the trustees have apparently done has been to collect the rents from the trust property, and take care of said property, and to make some money on the purchase and sale of a couple of lenses—which money does not seem to be now on hand. Shortly after the execution of the deed—on April 8, 1889—the trustees authorized Clark, of Boston, to contract with a party in Paris for disks for a forty-inch telescope at a certain price, part payments to be made at different times. In order to make the first payment, the trustees mortgaged the trust property to the State Loan and Trust Company. When the second payment became due there was no money to meet it. Two lenses were then in the possession of Clark, of Boston. Nothing was done toward making the second payment. It was apparent that the trust property was not of sufficient value to carry out the scheme, which contemplated one of the largest telescopes ever made. One of the witnesses, who was a trustee and president of the university, testified that he asked Mr. Spence if it would not be better to sell the lenses, and commence again with such a contract as the property would carry out; and that he said, "I think it would." But before his death he wrote a letter to the said witness, in which is the following: "In a conversation once had with you regarding the sale of the glass, it was my mind always that the purchasers should erect it somewhere near here. I fear that you did not so understand it. When I deeded the property, I hoped, of course, that I would have nothing more in the way of business to attend to except to designate the site. It seems now that the trustees will have trouble in raising the money to pay for the glass, something like \$18,000. I would not be satisfied with any smaller glass in connection with the university. If Raymond, Lowe or Clark would guaranty to erect it upon some one of our peaks, I think I would favor liberal terms with either of those men. If you think none of these points are advisable, it might be well to redeed the property back to me, and I will pay the price of the glass as per contract, and await further developments or future combinations, whereby we may yet be successful in securing for the university that object which we have so long cherished." Nothing further was done before his death; and about two months after that event the three remaining trustees, or one or more of them, sold their interest in the lenses which had arrived in Boston

to the Chicago University for \$9,500, and closed out the contract which Clark had made for them. With part of this money they satisfied the mortgage given to the State Loan and Trust Company; so that they then stood as they did at the beginning, except that, as they had paid only \$3,912 on the lenses, they made a profit on that transaction. The three remaining trustees have taken no further steps to carry out the purpose of the trust; they have not asked to have other trustees appointed; they have selected no site; they have, as the testimony of one of them shows, admittedly abandoned Wilson's Peak as a site, because there is no road there, and to either construct a road or to transport materials by a bridle-path would be impracticable. The most that can be said on the subject in their behalf is that perhaps at some indefinite period in the future, if the trust property shall become more valuable, and Professor Lowe shall complete a railroad to the summit of another mountain, they might possibly erect some kind of an observatory at some point on the latter mountain.

Moreover, how can this trust be now executed so as to carry out the purpose of the trustor? The clear purpose was to erect a first-class observatory. This is apparent from the language of the deed and from the acts of the parties. The trustees recognized that purpose when they entered into a contract for the purchase of lens for a forty-inch telescope—said to be larger than any heretofore constructed; and the trustor declared that he would not be contented with a smaller one, and suggested that the property be deeded back to him. It was found that the trust property was entirely insufficient in value to accomplish that scheme. Again, the site was to be approved by the trustor; and that is impossible, for he is dead. Furthermore, special confidence was evidently placed in the persons named as trustees, of whom the trustor himself was one, and the concurrence of four of them was necessary to important and essential acts, and particular powers were given to Trustee Bovard; but three of the trustees, including Bovard, are dead, and there are not four left.

It is contended that at least one of the difficulties caused by the death of the trustees may be obviated under section 2287 of the Civil Code, which provides that the superior court may appoint a trustee when there is a vacancy, and the declaration of trust provides no method of appointment. That section is a mere statement of the power which courts of equity have

always exercised in proper cases. A court of equity will not allow a trust to fail solely for want of a trustee; that is, if the purposes of a trust and the wishes of a trustor can be carried out by the appointment of a trustee, the court will make such appointment, even though no trustee at all had ever been appointed by the trustor. But where, as in the case at bar, the trustor has himself selected the persons who are to execute the trust, and has evidently placed special personal confidence in them, with a reasonable expectation that the material parts of the trust would be executed during their lives, and no steps have been taken toward such execution, and no equitable rights have grown up under their acts, there a court will not undertake to substitute strangers for the chosen agents of the trustor. In *Re Hinckley's Estate*, supra, this court said: "If it is determined that a peculiar personal trust and confidence were intended, new trustees will not be appointed," citing authorities. "In such cases the appointment of new trustees is refused when it appears from the will that the testator intended that none but the persons by him named should be intrusted with the power." And in the case at bar all the circumstances point to a personal confidence reposed in the persons selected to carry out the trust. The fact that no successors were provided for is itself significant, although, of course, not conclusive; but there can be no doubt that such special confidence was reposed in at least two of the trustees—Bovard and the trustor himself—and they are both dead. Would a court undertake to substitute strangers for these two, when there are no equities in favor of the named beneficiary, or any other person, arising out of any valuable consideration? It must be remembered that this was a purely voluntary trust, and that no complications have arisen by any attempt to execute it. Moreover, under such circumstances, where the purposes of the trust have failed, and cannot be accomplished according to the intent of the trustor, new trustees will not be appointed to carry out some plan other than the one which he designed. In such case the property reverts to the trustor or his estate: 1 *Perry on Trusts*, sec. 160; *Easterbrooks v. Tillinghast*, 5 *Gray (Mass.)*, 21; *Keith v. Copeland*, 138 *Mass.* 303. And, as we have before stated, no observatory such as the trustor contemplated can be erected, and no site can be selected in the manner provided by the deed.

Under the foregoing views, other findings assailed by appellants are immaterial. In my opinion, the judgment and order appealed from should be affirmed.

COLFAX MOUNTAIN FRUIT CO. v. SOUTHERN
PAC. CO.*

Sac. No. 87; October 24, 1896.

46 Pac. 668.

Connecting Carrier—Limitation of Liability.—Under Civil Code, section 2201, declaring that the liability of a carrier who accepts freight for a place beyond his route ceases on delivery to a connecting line, "unless he stipulates otherwise," a provision in a freight contract that the carrier's responsibility shall cease at the connecting point is not rendered ineffective by a further stipulation for through passenger train service.¹

Connecting Carriers—Limitation of Liability.—There being no repugnancy between the provision limiting the carrier's liability to its own line and the stipulation for through passenger train service, the fact that the first is printed, while the last is in writing, is immaterial in construing the contract.

Connecting Carriers—Limitation of Liability.—Where a railroad company receives freight for shipment under an agreement to forward it to its destination, and the stipulation that its liability as carrier shall cease on delivery of the goods to the first connecting line, the contract also providing for "passenger service through," the duty of the company as forwarding agent continues till the goods arrive at their ultimate destination, and it is therefore liable for any delay caused by its failure to notify each successive connecting road of the conditions of the contract in respect to the manner of transportation.²

Connecting Carriers—Damages for Delay.—In an Action by the Shipper against the contracting carrier for damages caused by such

*For subsequent opinion in bank, see 118 Cal. 648, 40 L. R. A. 78, 50 Pac. 775.

¹ Cited in the note in 106 Am. St. Rep. 606, on the liability of an initial carrier for the torts or negligence of connecting lines.

² Cited with approval in *Weaver v. Southern Ry. Co.*, 135 Mo. App. 216, 115 S. W. 502, when the court said: "A carrier is acquitted of its obligation as insurer arising from the contract of affreightment in such circumstances only when it is made to appear that the loss must have occurred notwithstanding its breach of duty."

delay, the burden is on defendant to show that it notified each successive connecting road of the conditions regarding the manner of transportation, or, if it did not, that the delay was not attributable to its default in this respect.

APPEAL from Superior Court, Placer County; J. E. Prewitt, Judge.

Action by the Colfax Mountain Fruit Company against the Southern Pacific Company to recover damages resulting from delay in the transmission of freight. Judgment for plaintiff, and defendant appeals. Reversed.

Foshay Walker for appellant; Ben P. Tabor for respondent.

BRITT, C.—At the trial of this case the parties agreed on the facts by written stipulation which was adopted by the court as its findings. It thus appears that on October 24, 1890, defendant was a common carrier operating a line of railroad between Colfax, in Placer county, and Ogden, Utah, the latter point being the terminus of its route in the direction of the city of New York. On that day defendant received from plaintiff at Colfax a carload of fruit for transportation according to the terms of a written contract called a "shipping order" signed by plaintiff, describing the goods to be carried, stating that the same were to be forwarded to Ogden station and there delivered, and containing also the following matter: "Consignee, marks, and destination: Sgo-bel & Day, New York. . . . Care C. & N. W., via Erie Dispatch, New York. Passenger train service, U. P. 32009. Agent Southern Pacific Company will please forward subject to conditions and agreements indorsed hereon." One of such conditions was that: "The company agrees to forward the property to the place of destination named, but its responsibility as a common carrier is to cease at the station where the freight leaves this road, when the property is to be delivered to connecting roads or carriers." It seems that the characters "U. P. 32009" meant "Union Pacific car No. 32,009." Concurrently with the execution by plaintiff of such shipping order, the defendant gave to plaintiff a "shipping receipt," which differed from the order mainly, for present purposes, in that it contained the words "passenger service through," instead of "passenger train ser-

vice," as in the order. At this time there was a traffic agreement in force between defendant and several other carriers, whose routes, by successively connecting, formed a through line, viz., the Union Pacific Railway Company, the Chicago and Northwestern Railway Company, and the Erie Dispatch Company, and pursuant to such traffic agreement said car of fruit was carried to New York. There the Erie Dispatch Company delivered it to the consignees, and collected of them the whole amount of freight charges for the haul from Colfax, which amount was divided in gross among the several connecting carriers for the carriage by them respectively furnished to the goods in accordance with their said arrangement. Defendant transported the car in question, by passenger train, over its road to Ogden, and there delivered it to the Union Pacific Railway Company, the next connecting carrier, with request that the last-named company "and its connection between Ogden and New York City should, until the arrival of said car at final destination, accord to it passenger train service." After such delivery to the Union Pacific Company—but on what line does not appear—delay occurred in the transmission of the car, so that it was three days overdue on arrival at New York, and in consequence the fruit suffered decay, and was sold at a loss to plaintiff. For the amount of such loss the court below held defendant liable, and rendered judgment in plaintiff's favor.

With us it is declared by statute that the liability of a common carrier who accepts freight for a place beyond his usual route ceases upon delivery of the freight at the end of his route in that direction to some other competent carrier carrying to the place of address, or connected with those who thus carry, unless he stipulates otherwise: Civ. Code, 2201. Plaintiff contends that the defendant in this instance "stipulated otherwise." It is not argued that any relation of partnership arose between the connecting carriers on account of their said traffic agreement (*Darling v. Railroad Co.*, 11 Allen, 298; *Hutchinson on Carriers*, sec. 169), but that by the contract with plaintiff defendant itself undertook to furnish passenger train service for the car from Colfax to New York, the connecting lines being its agents for this purpose. For defendant it is claimed that upon de-

livery of the car at Ogden to the next connecting carrier, with instruction for continued passenger train service, defendant's obligation under the contract terminated. We are unable to agree with either contention. Conceding, as plaintiff maintains, that the words "passenger service through," in the shipping receipt, are to be read as part of the agreement of the parties—although in the stipulation on which the case was tried such contract is said to be contained in the shipping order signed by plaintiff—there is yet no repugnancy between the provision for such service and the condition indorsed on both order and receipt that the responsibility of defendant as a common carrier shall cease at Ogden when the property is delivered to a connecting road; and, in the absence of conflict between the provisions the fact asserted by counsel, that the language "passenger service through" was in writing, while said indorsement was printed only, is of no influence in the proper construction of the instrument: *Vorwerk v. Nolte*, 87 Cal. 236, 25 Pac. 412. The stipulation for through passenger train service, understood as it must be in connection with the agreement to deliver at Ogden, and with other parts of the contract, imports that defendant will, as a common carrier, afford service of that description over its own line to Ogden, and thereafter will, as a forwarding agent, do those things incumbent upon it to secure like service for the car to the place of final destination. The car, as marked and accepted, was "through" freight, yet this did not bind defendant to give it transportation beyond its own route: *Civ. Code*, 2201; *Palmer v. Railroad Co.*, 101 Cal. 187, 35 Pac. 630. To stipulate for passenger train service, then, was but to particularize the means of transmission, not to change the parties by whom, without those words, transmission was unquestionably to be effected. Nothing different is held in *Pereira v. Railroad Co.*, 66 Cal. 92, 4 Pac. 988. Hence, the responsibility of defendant as common carrier having ended at Ogden, no sufficient facts are found to make it liable for the subsequent delay. But the terms of the contract show that defendant's duty of forwarding agent existed after its relation of common carrier ceased, and continued to the end of the route. This is an important feature of such a contract. "The owner does not and cannot always accompany [the goods], and give his personal direc-

tions to each one of the successive carriers. He therefore necessarily, in his own absence, devolves upon the carrier to whom he delivers the goods the duty and invests him with authority to give the requisite and proper instructions to each successive carrier to whom, in due course of transportation, they shall be passed over for the purpose of being forwarded to the place of their ultimate destination. Otherwise they would never reach that place": *Briggs v. Railroad Co.*, 6 Allen (Mass.), 246, 249, 83 Am. Dec. 626. See, also, *Northern R. Co. v. Fitchburg R. Co.*, 6 Allen, 258. This duty it performed on delivery of the goods to the first intermediate carrier, the Union Pacific Company, but the record fails to show whether it gave or caused to be given any request or direction to the Chicago and Northwestern Railway Company, or to the Erie Dispatch Company, concerning the service to be afforded the car when it came into their hands respectively. Defendant took the risk of obedience to its request to the Union Pacific Company for communication of such instructions. If the delay complained of occurred by reason of failure in this particular, defendant is responsible for it. Plaintiff had not authorized delegation of its agency as forwarder. If, however, proper and timely instructions were given to each successive carrier, then defendant is not liable for failure of any of them to observe the same: *Hooper v. Wells, Fargo & Co.*, 27 Cal. 11, 27, 85 Am. Dec. 211; *Northern R. Co. v. Fitchburg R. Co.*, 6 Allen, 254.

There are, therefore, absent from the record material findings necessary to the rendition of judgment, and the case must be tried anew. Upon such trial the question of the burden of proof may be important. The authorities having a bearing on this subject by analogy are not harmonious, but in our opinion the better and juster reason requires that, the facts appearing in the present record being established, defendant shall have the burden of proof to show that, as bailee of the goods for the purpose of forwarding them from Ogden to New York, it performed or caused to be performed the obligations assumed by it under the contract with plaintiff as to each successive carrier, or, if it did not, then that the delay in transmission was not attributable to its default in this regard: *Boies v. Railroad Co.*, 37 Conn. 272, 9 Am. Rep. 347; *American Exp. Co. v. Second Nat. Bank of Titus-*

ville, 69 Pa. 394, 402, 8 Am. Rep. 268; Clark v. Spence, 10 Watts (Pa.), 335, 337; Funkhouser v. Wagner, 62 Ill. 59; Collins v. Bennett, 46 N. Y. 490; Ouderkirk v. Bank, 119 N. Y. 263, 23 N. E. 875.

The contract between the parties as stipulated at the trial varied greatly from that alleged in the complaint, but it seems no objection was made by defendant on this ground in the court below, and we think the plaintiff should have leave to amend on return of the case to that court. The judgment should be reversed and the cause remanded for a new trial.

We concur: Searls, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is reversed and the cause remanded for a new trial.

HART et al. v. KIMBERLY et al.

L. A. No. 280; October 29, 1896.

46 Pac. 618.

Appeal—Failure to File Transcript—Inexcusable Neglect.—Subsequently to the taking of the appeal, one of the appellants, being ill, requested her attorney to desist from further proceedings, but, after receiving notice of a motion to dismiss the appeal for failure to file the transcript within the required time, said appellant directed the attorney to proceed with the cause. No action was taken toward the preparation of a transcript prior to appellant's first direction to her attorney, nor after the order to proceed with the appeal. Held, that the appeal would be dismissed.

APPEAL from Superior Court, Santa Barbara County; W. B. Cope, Judge.

Action by Hart and others against Kimberly and others. An appeal was taken from the judgment, and appellees moved to dismiss the same for failure to file the transcript. Motion granted.

B. F. Thomas for appellants; E. B. Hall and Richards & Carrier for respondents.

PER CURIAM.—The appeal herein was taken May 26, 1896, and, no transcript on appeal having been filed in this court, the respondents, on August 27th, gave notice to the appellants of a motion to dismiss the appeal. At the hearing of the motion the appellants presented affidavits to the effect that one of the appellants had been ill, and that, while in this condition, had, on June 15th, instructed her attorney to desist from any further proceedings in the cause, and that thereupon he had abandoned all proceedings for filing the transcript; that in the latter part of August the appellant requested her attorney to proceed with said appeal. Upon these statements appellants ask to be relieved from their default, and that they be allowed twenty days within which to file a transcript on appeal. The motion must be denied. No action toward the preparation of the transcript appears to have been taken prior to the direction to the attorney not to proceed with the appeal, or since the subsequent direction to proceed therewith; nor is it shown that this latter direction was given until after receiving the notice to dismiss the appeal. While the illness of the appellant, as shown by the affidavits, might have been urged as ground for an order extending the time within which to file the transcript if such extension had been asked within the forty days, it is not a sufficient reason for relieving her from default when the application therefor is made after the default. The motion to dismiss the appeal is granted.

PEOPLE v. THOMPSON.

Crim. No. 159; November 30, 1896.

46 Pac. 907.

Criminal Law.—An Appeal from an Order Fixing the Day for the execution of a sentence of death will be dismissed where it appears that the day so fixed has long since passed.

APPEAL from Superior Court, Los Angeles County; B. N. Smith, Judge.

W. H. Thompson was convicted of a crime, and sentenced to death. From an order fixing the time of execution, the defendant appeals. Dismissed.

Ben. Goodrich, D. K. Trask and Wm. A. Harris for appellant; Attorney General Fitzgerald for the people.

PER CURIAM.—This is an appeal from an order appointing a day for the execution of the judgment of death pronounced against the defendant. At the time the day was so appointed an appeal was pending from an order refusing a new trial, and the point made here (if it can be said that any point was made) was that it was error to execute the judgment pending that appeal. The time for execution of the judgment was fixed for May 22, 1896. As that time has long since passed this appeal is of no further interest, and is therefore dismissed.

LAVER et al. v. HOTALING.*

S. F. No. 502; December 7, 1896.

46 Pac. 1070.

Services of Architects—Evidence of Value.—In an Action by Architects to recover for services, evidence of a rule of compensation of architects established by architects' institutes and associations is not admissible when not accompanied by any proof that the rule was known to defendant at the time of the alleged contract, or that it was so generally accepted by the public as to give it the standing of a custom, knowledge of which was to be imputed to him.¹

Evidence—Waiver of Objections.—Where plaintiff testified on the direct examination as to an alleged custom, defendant did not waive his objections to such evidence by cross-examining plaintiff thereon, or calling witnesses to disprove it.²

APPEAL from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Augustus Laver and another against A. P. Hotaling to recover for services rendered by plaintiffs as

*For subsequent opinion in bank, see 115 Cal. 613, 47 Pac. 593.

¹ Cited in *Smith v. National Bank of D. O. Mills & Co.*, 191 Fed. 232, as supporting the doctrine that "no usage can change the plain meaning of a contract."

² Cited in the note in 33 L. R. A., N. S., 104, on waiver of objections to testimony by cross-examination.

architects. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Robert Harrison and Michael Mullany for appellant; A. P. Van Duzer and Walter H. Levy for respondents.

BRITT, C.—Plaintiffs are copartners in the practice of their profession of architects. They sued in this action to recover the alleged reasonable value of services performed, it is claimed, at defendant's request in the preparation of drawings, plans and specifications for a building defendant had in mind to erect. After verdict and judgment in plaintiffs' favor, the court granted a new trial on the sole ground specified in its order that it erred at the trial "in permitting the introduction of evidence of a rule of compensation of architects established by architects' institutes or associations." Plaintiffs appeal, and contend, firstly, that the court mistook in assuming that it had allowed evidence of the character mentioned in the order granting a new trial. While it hardly appears that plaintiffs directly offered the conventional rates of compensation fixed by any society of architects for professional services, yet there was an undertone of reliance thereon in a great part of the evidence for plaintiffs as the basis on which estimates of the value of their services were founded; and it sufficiently appears that defendant ineffectually endeavored, by motion to strike out and otherwise, to exclude testimony of such value having those rates as its data. Thus, Mr. Laver, one of the plaintiffs, testified that there is a uniform rule governing the compensation of architects. On cross-examination he was asked, "Is that rule established by the Architects' Association here?" He replied, "That is established by every civilized country in the world"—a certain percentage on the cost of the structure, payable when the specifications are finished. Another one of the plaintiffs testified that the value of their services was two and one-half per cent of the estimated cost of the building; that he based this statement upon "the custom." Mr. O'Connor, a witness for plaintiffs, stated that the estimate he gave upon the subject of value was arrived at by reference to a custom prevalent in various cities, and "published in the rules and regulations of the American Institute of Architecture." There was other testimony of similar tendency. All

of it received color beyond what it possessed intrinsically from the following instruction of the court to the jury: "In order to prove the value of those services, plaintiffs have called witnesses to show that under a rule of the Architects' Association of New York the builder or owner must pay for the architect's plans, profiles and specifications compensation on the basis of a percentage upon the contemplated cost of the building. They say that is an arbitrary, fixed rule of those architects. If you should be satisfied that such a rule as that exists, and that plaintiffs are otherwise entitled to recover, you may award a verdict on the basis of that compensation." In this condition of the case we think the statement of the court in its order that evidence had been received "of a rule of compensation of architects established by architects' institutes or associations" was not materially inaccurate. The jury must have retired with the conviction that such evidence was before them for consideration. This evidence, standing alone, was incompetent. It was not accompanied by any proof that the rule or usage of architects was known to the defendant at the time of the alleged contract with plaintiffs, nor that it was so generally accepted and acted upon by the public as to give it the standing of a custom, reasonable, uniform and notorious, knowledge of which was to be imputed to him. In the absence of such complementary proof, the law, as we understand it, does not allow that a rule for professional guidance, adopted by organizations or societies of the members of any profession, is competent evidence in their favor in controversies with lay employers regarding the quantum of their compensation: See 27 Am. & Eng. Ency. of Law, 739; Mechem on Agency, sec. 963, note 1; Blake v. Stump, 73 Md. 171, 10 L. R. A. 103, 20 Atl. 791; Taliaferro v. Bank, 71 Md. 200, 17 Atl. 1036; McMasters v. Railroad Co., 69 Pa. 374, 8 Am. Rep. 264. We do not deny the principle illustrated by Sewell v. Corp., 1 Car. & P. 392, Thomas v. Brandt (Md.), 26 Atl. 524, and other cases, that, if there is a general usage, applicable to the charges of a particular profession, it may be looked to in order to determine the compensation to be paid by one who employs an individual of that profession; but we hold that such a usage cannot be proved for that purpose against laymen by showing a rule adopted within the profession only.

It is urged that the existence of the rule or custom of architects was developed on cross-examination of plaintiffs' witnesses; also that testimony concerning the same matter was given by a witness called by defendant, and hence that the latter cannot complain of the error. But the evidence of plaintiffs related to an alleged customary rule of charges, and we think defendant might, without waiving his objections, produce evidence either by cross-examination or from his own witnesses to exhibit the source of the alleged custom, and to show more clearly the incompetence of the plaintiffs' evidence in that behalf. As nearly as we can make out, this was the purpose of the course of interrogation pursued by defendant. In our opinion, none of the objections advanced by plaintiffs to the order appealed from are maintainable, and it should be affirmed.

We concur: Haynes, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order appealed from is affirmed.

WARREN v. CONNOR et al.

Sac. No. 121; December 15, 1896.

47 Pac. 48.

Estoppel in Pais.—In an Action Against C. and Her Son for Conversion of farming implements on a certain ranch, it appeared that C. and her husband sold such ranch, and all farming implements on it, to one H.; that afterward H. sold all the personal property to plaintiff; that, before the sale to H., the son bought all the implements on the ranch, and farmed the land as a tenant; that H.'s foreman, in company with the agent of C. and husband, made an inventory of the implements on the ranch; that the son did not point them out; that before the transfer of the personal property the son told H.'s agent that the implements were his, and the agent knew he was using them; and that, at the time, defendants were living in one of the houses on the ranch, the son being a tenant of H. There was no claim that the son had in any manner misled H. as to the ownership of the implements. Held, that the son was not estopped from asserting his ownership as against H. or plaintiff.

APPEAL from Superior Court, Sacramento County; A. P. Catlin, Judge.

Action of trover by M. J. Warren against Sarah J. Connor and W. W. Connor for the conversion of certain personal property, consisting principally of farming implements, tried to the court without a jury, in which there was a judgment for plaintiff. From an order denying their motion for a new trial defendants appeal. Reversed.

Hiram W. Johnson for appellants; Armstrong & Bruner and J. C. Ball for respondent.

HAYNES, C.—This appeal is by the defendants from an order denying their motion for a new trial. The action is in trover for the conversion of certain personal property, consisting principally of farming implements, of the alleged value of \$660. The cause was tried by the court without a jury, and the court found that the defendants had converted to their own use certain specified portions of the said property, of the value of \$594. The plaintiff claims title to the property in controversy through an alleged sale thereof by Thomas Hovenden to her. This property was upon a large ranch containing about three thousand nine hundred acres, which was formerly owned by George D. Connor and the defendant Sarah J. Connor, his wife. On December 23, 1890, said George D. Connor and Sarah J. Connor entered into a contract with said Hovenden to exchange said ranch for certain real estate owned by Hovenden. This contract provided that said Hovenden should have, in addition to the real estate, "one-fourth of all growing crops, and all the farming implements of every description now upon said premises, and also the McClennan and the Sanders barn, with all the hay, straw, etc., therein, for the sum or price of \$34 per acre." The first parties also agreed in and by said contract to sell to Hovenden "whatever hay is left in the home barn upon said premises for the sum or price of \$10 per ton; also, one hundred and sixty head of cattle, more or less, now upon said premises, at the sum or price of \$15 each." On February 17, 1891, said George D. Connor and wife, by L. F. Ward, their attorney in fact, executed to Hovenden a bill of sale of the following described personal property, then on the ranch known as the "Connor Ranch," namely: "158 head of cattle,

valued at \$15 each; 27 hogs of 219 pounds, 87 hogs of 100 pounds, 50 pigs, in all valued at \$700; 50 tons hay at \$10 each, valued at \$500; 70 sacks of wheat, 140 pounds, at 1¼ per pound, valued at \$122; also, all the farming implements and vehicles, including wagons on said ranch on the 23rd day of December 1890, together with one-fourth of all growing crops upon said ranch, but excepting therefrom one covered spring wagon and all buggies—it being the intention of this instrument to carry into effect a certain agreement made by the above-named parties of the first part with the party of the second part, and dated the 23rd day of December, A. D. 1890.” Mrs. M. J. Warren, the plaintiff in this action, claims title to the property in controversy under the following instrument:

“San Francisco, October 19, 1891.

“Mrs. M. J. Warren bought of Thos. Hovenden all the personal property that Geo. D. Connor and Sarah J. Connor sold me on the Connor ranch, Sacramento county, California, saving and excepting what was delivered to late Mr. Arthur Bunker to my account. Received payment in full, ten dollars. I authorize the said Mrs. M. J. Warren, who now lives on the ranch, to take full possession of the property as her own wherever she may find it.

“THOS. HOVENDEN.”

The defendant W. W. Connor claims to be the owner of all the property described in the findings, and, as to the hay, it is contended that Hovenden and his agent received all the hay mentioned in the contract and bill of sale above mentioned. In relation to his ownership of the farm implements in controversy, the defendant W. W. Connor testified, in substance: That, about eleven years before the trial, he and his two brothers, George T. and R. L. Connor, formed a copartnership under the firm name of Connor Bros., and for about three years thereafter said copartnership farmed a large part of the ranch. That, at the time they commenced farming, most of the implements then on the farm were old and nearly worn out. That the firm purchased farming implements with their own money, and in their own name, sufficient to run the place. This copartnership continued for about three years, when the defendant W. W. Connor bought out the interest of his brothers, and he continued, to the time of the sale to Hovenden, to farm the land in the same manner as other ten-

ants paying rent therefor. That said implements sued for were purchased in part by said copartnership, and in part by said defendant after the dissolution of the partnership, and while he was farming the land on his own account. He specified the persons from whom he purchased all, or nearly all, of the implements included in the findings of the court, and as to these general facts there is no contradiction of his testimony.

It is contended, however, on behalf of the plaintiff, that the defendant W. W. Connor had seen the contract made by his father and mother with Hovenden in December, 1890, and also that he was present when the personal property was delivered over to Arthur Bunster, as the agent of Hovenden, and that he did not make any objection. But whatever farming implements were bought by Hovenden were bought in December, and their value was included in the price of the land, and there is no evidence that W. W. Connor, either by representations or conduct, misled him as to their ownership. Counsel for respondent is mistaken in saying that defendant W. W. Connor, on his cross-examination, "said he signed the agreement containing the clause, 'together with one-fourth of all the growing crops, and all farming implements, of whatsoever description, now upon said premises.'" At the folio cited by counsel, defendant was asked: "Q. You say you saw that agreement? A. I did." Besides, the contract itself was put in evidence, and it does not show such signature. The only evidence touching any signature by said defendant occurs in the testimony of Dalzell, who was Hovenden's foreman on the ranch, Bunster being the agent who received the cattle and hogs that were delivered in February. Dalzell stated that he (W. W. Connor) "put his name to the signature of the whole transaction. I do not know where the paper is now that he signed. I took an inventory, at the time, of all the property that was turned over, and pointed out as the property of Mr. Hovenden." The witness gave no explanation as to what paper it was that was signed by defendant, nor for what purpose it was made. He produced a book upon the trial in which he had made an inventory of all the farming implements, but he did not state where they were, nor by whom, if by anyone, they were shown to him; but in his affidavit made in reply to the affidavit of Mr. Ward, the attorney in fact of George D. and Sarah J. Connor, and which was read

upon defendant's motion for a new trial, Dalzell said "that on the thirteenth day of February, 1891, this deponent was driven in a buggy by said L. F. Ward over the said Connor ranch, and that while he and said L. F. Ward were in said buggy, as aforesaid, this deponent noted down in his pocket-book the several agricultural implements lying in different places on said ranch, and made an inventory thereof." It may be fairly assumed that said inventory was the one produced on the trial, and the circumstances under which it was made shows not only that there was no gathering up of the implements and formal delivery thereof, but that the defendant W. W. Connor did not point out the implements to the witness. The said defendant further testified that, at the time the bill of sale was made, his father had upon the ranch a truck wagon, a mower, one or two single plows, two seed sowers, and a hay-rake; that at the time the cattle and hogs were transferred, in February, there was nothing said about the farming implements; that prior to said transfer he had many conversations with Mr. Bunster about the ranch, and told him that the farming implements were his; and that Bunster knew that he was using them. The evidence that the farming implements in controversy were purchased by and were the property of the defendant W. W. Connor at the time the contract of sale was made with Hovenden by his father is uncontradicted. His father could not, by any contract he could make with Hovenden, vest in him any right or title thereto, and the question, therefore, is whether the defendant is estopped by his conduct from asserting his ownership as against Hovenden or his transferee. There is no pretense that the defendant W. W. Connor was present at the time the contract was made in December, or in any manner misled Hovenden as to the ownership of the farming implements. They were not sold as separate property, but were included in the price paid for the ranch, while all the other personal property was purchased by Hovenden, as distinct from the ranch, at certain specified prices, and that property was not delivered or paid for until the number and value of the cattle and hogs were ascertained, in February. It is true, the defendants were still living in one of several houses upon the ranch, but W. W. Connor was there as the tenant of Hovenden of a portion of the land, cultivating the same upon shares, and using said implements; and Bunster, the agent of Hoven-

den, and the person to whom the other personal property was delivered, was told by the defendant, prior to the execution of the bill of sale, that the farming implements were his, and this testimony given by defendant is not contradicted. All the conversations with said defendant, testified to by the plaintiff and her son, occurred after plaintiff's purchase from Hovenden, and his alleged statements in those conversations, therefore, could not have influenced her purchase. We fail to find any evidence which would justify a finding that W. W. Connor was estopped by his conduct or declarations from asserting his ownership, either as against Hovenden or the plaintiff, as to the farming implements. As to the hay there was a direct conflict; but as the court did not find the value of the hay separately, but lumped the value of all the property, the judgment cannot be modified, and a new trial is therefore necessary.

In view of the conclusion above stated, it is not necessary to notice the affidavits of new evidence, and the counter-affidavits filed thereto, further than to say that in our judgment they strengthened defendants' grounds for a new trial. It should be added, in view of a new trial, that the only ground of the alleged liability of the defendants is for a conversion of the property described in the complaint. We find in the record no evidence of a conversion by the defendant Sarah J. Connor; and if, upon another trial, a conversion should be shown to have been made by only one of the defendants, judgment should be rendered in favor of the other. The judgment and order appealed from should be reversed.

We concur: Searls, C.; Britt, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are reversed.

STEPHENS et al. v. HAMBLETON et al.

Sac. No. 165; December 15, 1896.

47 Pac. 51.

Ejectment—Motion for Nonsuit.—In Ejectment, defendant's motion for a nonsuit is properly denied, where it appears that plaintiffs bought the property from its owner, and took a bond for deed, under which they entered into and held possession of the property, claiming title thereto for more than two years before defendants entered and ousted them.

APPEAL from Superior Court, Yolo County; W. C. Van Fleet, Judge.

Action of ejectment by B. H. Stephens, administrator, etc., of P. H. White, deceased, and others, against J. W. Hambleton and others. From a judgment in favor of plaintiffs and an order refusing a new trial defendants appeal. Affirmed.

R. Clark for appellants; F. E. Baker and Craig & Hawkins for respondents.

BELCHER, C.—This is an action of ejectment to recover possession of a strip of land containing twenty-five and one-fifth acres. It appears that plaintiffs and defendants own adjoining tracts of land in Yolo county, plaintiffs' tract lying north of defendants' tract. The strip in controversy extends along the dividing line of the said tracts from the east to the west side thereof, and is claimed by both parties. The question is as to the true location of this dividing line. The case was tried by the court without a jury, and the findings upon all the issues were in favor of the plaintiffs. The judgment was that the plaintiffs recover possession of the said strip of land, and damages, in the sum of \$475, sustained by plaintiffs by reason of the wrongful detention thereof. From this judgment and an order refusing a new trial defendants appeal.

1. The court did not err in denying defendants' motion for nonsuit. All of the deeds offered in evidence by plaintiffs were admitted without objection by defendants. Copies of the deeds are not set out, but most, if not all, of them had been recorded, and presumably, they were properly executed, ac-

knowledge and certified, so as to entitle them to record. The fact that plaintiffs bought the property from its owner, and took a bond for a deed, under which they entered into and held possession of the property, claiming title thereto, for more than two years before defendants entered and ousted them, was sufficient to enable them to maintain the action. Prior possession alone, as against a mere intruder, is sufficient to support an action of ejectment: *Potter v. Knowles*, 5 Cal. 88; *Leonard v. Flynn*, 89 Cal. 543, 26 Pac. 1099; *Shanahan v. Tomlinson*, 103 Cal. 89, 36 Pac. 1009.

2. It is claimed that the findings were not justified by the evidence. It is true the evidence was conflicting in many respects, but there was evidence sufficient, in our opinion, to justify all of the findings. The judgment cannot, therefore, be disturbed on this ground.

3. It is also claimed that the court erred in admitting certain evidence over the objection of defendants, and in refusing to strike out, on their motion, certain evidence given. In our opinion the record discloses no material error in any of the rulings complained of. Each of the said rulings appears to have been justified and proper. The damages awarded were authorized by the pleadings, evidence and findings. The judgment and order appealed from should be affirmed.

We concur: Haynes, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

BYXBEE v. DEWEY.

Sac. No. 35; December 15, 1896.

47 Pac. 52.

Replevin—Answer—Sufficiency of Denial.—A complaint alleged that plaintiff was the owner and entitled to the possession of certain personal property taken by defendant. The answer denied that plaintiff was "the owner in possession and entitled to the possession" of the property, and alleged that defendant was, and had been for a long time, the owner and in the possession of the property. Held, that the

affirmative averment was sufficient to negative the allegation that plaintiff was entitled to the possession.

Sale—Change of Possession.—Defendant Purchased of a debtor a number of raisin trays in payment of a debt. The trays were not removed from the shed on the debtor's farm where they were stored, but defendant wrote his name on a large number of them, and kept a man continuously at the debtor's house to look after the trays. Held, that there was no such open and continuous change of possession as would render the alleged purchase valid as against execution creditors of the vendor.¹

APPEAL from Superior Court, Fresno County; Stanton L. Carter, Judge.

Action by J. O. Byxbee against Henry Dewey. From a judgment for defendant, plaintiff appeals. Reversed.

L. L. Cory for appellant; W. D. Grady for respondent.

PER CURIAM.—The plaintiff brought this action to recover the possession or value of eleven thousand raisin trays, more or less. The case was tried before a jury, and the verdict and judgment were in favor of defendant. The plaintiff moved for a new trial, which was denied, and has appealed from the judgment and order denying his motion.

Two propositions are relied upon and urged as grounds for a reversal. They are: (1) That the denials in defendant's answer were not sufficient to raise an issue as to plaintiff's right to recover possession of the property sued for; (2) that

¹ Cited and followed in *Lemon v. Wolff*, 121 Cal. 275, 53 Pac. 802, where the court said that one by merely marking certain sacks of beans and moving them to a different place in the barn did not acquire an interest in them, as against the creditors of the person affecting to sell.

Cited and followed in *Davis v. Winona Wagon Co.*, 120 Cal. 247, 52 Pac. 488, to the effect that immediate delivery and change of possession is an indispensable element of a sale.

Cited in *George v. Pierce*, 123 Cal. 177, 56 Pac. 53 (where there had been a pledge of personal property and no delivery), as following *Stevens v. Irwin*, 15 Cal. 503, and the court say thereupon: "Indeed, at every milestone in the long road leading from volume 15 of the California Reports to volume 121, some case may be found indorsing, either by title or in principle, the doctrine of *Stevens v. Irwin* upon the sufficient delivery of personal property as against the claims of attaching creditors."

the purchase of the said property by defendant was not accompanied by an immediate delivery, and followed by an actual and continued possession thereof, as required by section 3440 of the Civil Code, and hence it was subject to seizure by a creditor of the seller. The complaint alleges that on the twenty-fourth day of June, 1893, the plaintiff was the owner and entitled to the possession of the personal property before mentioned, and that on said day the defendant, without the consent and against the will of the plaintiff, took said property from the possession of plaintiff and still retains the same. The answer "denies that heretofore, to wit, on or about the twenty-fourth day of June, 1893, plaintiff was the owner, in the possession, and entitled to the possession" of the personal property described in the complaint, and further "denies that heretofore, to wit, on or about the twenty-fourth day of June, 1893, the said defendant, without the consent of plaintiff and against his will, took the said trays from plaintiff's possession, and still withholds the same," and alleges "that said trays were at said time, and for a long time prior thereto, the property of the defendant and in his possession." And it further alleges, in a separate answer, and by way of cross-complaint, that on or about the first day of March, 1893, the defendant purchased the said trays from one William Applegarth, and thereupon took possession thereof, and ever since has been in the continuous possession of said property.

It is argued for appellant that the denials in the answer are conjunctively stated, and are therefore evasive and insufficient, and that, in effect, there is no denial of the averment that plaintiff was entitled to the possession of the property. The answer was not well drawn, but it must all be read together, and, when so read, we think it must be held sufficient. The affirmative averment that the trays were, and for a long time had been, the property of defendant, and in his possession, was sufficient to negative the averments of the complaint as to plaintiff's ownership and right of possession. "It is not essential that a traverse should be expressed in negative words. The averment in the answer of the contrary of what is alleged in the complaint has been held to be equivalent to a denial": *Perkins v. Brock*, 80 Cal. 320, 22 Pac. 194; *Miller v. Brigham*, 50 Cal. 615.

As to the second proposition, section 3440 of the Civil Code provides: "Every transfer of personal property . . . is con-

clusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession," etc. The rule declared by this section was not new in this state when the codes were adopted. Substantially the same provision was found in the statute of frauds in 1860, when the case of *Stevens v. Irwin*, 15 Cal. 503, 76 Am. Dec. 500, was decided. In that case the court, in construing the meaning of the statute, said: "The delivery must be made of the property. The vendee must take the actual possession. That possession must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee. It must be such as to give evidence to the world of the claims of the new owner. He must, in other words, be in the usual relation to the property which owners of goods occupy to their property. This possession must be continuous; not taken to be surrendered back again; not formal, but substantial. But it need not necessarily continue indefinitely, when it is bona fide and openly taken, and is kept for such a length of time as to give general advertisement to the status of the property and the claim to it by the vendee." And in *Cahoon v. Marshall*, 25 Cal. 198, the court, speaking of the same statute, said: "What constitutes an actual change of the possession of personal property, as distinguished from that which by mere intendment of law follows the transfer of title, is not of difficult solution. It is an open, visible change, manifested by such outward signs as render it evident that the possession of the vendor has wholly ceased." Since the above-mentioned decisions were rendered there have been numerous other decisions by this court to the same effect, and the rule is now firmly established that to constitute such a change of possession of personal property as will make the transfer valid against creditors of the vendor, there must be such a change of the apparent custody of the property as to indicate to the world that a change of ownership has taken place, and to put one dealing with the vendor with respect to the property upon inquiry as to its ownership.

The question, then, is, Was there such a change of possession of the trays in controversy as was required to make a valid transfer thereof as against a creditor of the former

owner? For the plaintiff it was proved that he purchased the trays on June 8, 1893, at a sale thereof made by the sheriff under and by virtue of a writ of execution issued on a judgment recovered by one Yancey against William Applegarth in the superior court of Fresno county, and that the trays were then stored in a dry-house and shed situated on a place occupied by Applegarth, about six miles west of Fresno. For the defendant Mr. Applegarth testified: "I sold the trays as they laid in the shed and dry-house to Henry Dewey on the twenty-fifth day of February. At the time of the sale I went with Mr. Dewey to the shed, and I said, 'There is your trays and your sweat-boxes,' and that was, I presume, all the actual delivery that was made. I don't know that Mr. Dewey did anything after that in reference to the trays. He stayed in the shed awhile, but went back to the house. I do not know of anything else being done. I owed Mr. Dewey a debt, and he said he wanted a settlement, and I sold him the trays. At that time I did not expect to have any opportunity to use the trays. I did nothing with the trays after the sale. I put Mr. Dewey in charge of them when I sold them to him. After the sale his son Charles came there, and, as I understood, was in charge. He stayed there until the property was sold, and I had no more control of the property, and then he went away. The trays remained there just the same as they did before and up to the time of the execution, and Mr. Dewey never attempted to take any of them away. I never saw him attempt to take any of them away. A while after I sold them I noticed there was a writing on some of them. Some of them had 'H. Dewey,' and some of them 'H. Dewey's trays.' I live in the house on the place where the trays were. I cultivated and took care of a part of the place. Where the trays are there is no cultivation. I exercised the same acts of ownership over the place as I did before. I lived there the same as before. Mr. Dewey's son came over there and did some work for me. He told me he was going to take charge of the trays. He ate and slept in my house, and was around the place generally during the day. He didn't stay near the trays any more than I did. There was nothing to indicate to anybody passing there that he was in possession of the trays any more than I was." The defendant testified that he lived in Riverdale, and was a vineyardist, and that he bought the trays of Mr. Applegarth in February, 1893. "They were in

Mr. Applegarth's shed at the time I purchased them. After the purchase, in the first place I marked them with a pencil—wrote my name on the outside of them; and in a few days I sent a man over there to take possession of them. It was high water at our place, so that I could not haul them away. The road was all under water, and I sent a man over there, and he stayed there about a month. . . . I had two different men there, and I was there most of the time. I continued to hold this property, and, when they were going to take them away, I went over and nailed them up. I was there when they came after them, and prevented it. I was prevented from hauling them away at the time I purchased them because there was high water in our district. There was two miles of water, and it was impassable for heavy teams pretty near from the time I bought these trays until after they were seized, so that I could not haul those trays away. . . . I had my son there to watch and keep the trays. My son Charles went there first. He stayed there, probably a month, in possession of the trays after I purchased them. I then sent John Dewey, who was there the balance of the time. . . . The trays at that time (when the bill of sale was made) were all piled up in the shed and outside of the shed. They were in the same position there, piled there, when the execution was levied as when the bill of sale was made. I had not removed any of them. I couldn't. There was no flood around the trays. They could have been moved from there, but that would have been a big expense. There was no difficulty about moving the trays, but cost a good deal of money. It would have cost to take them to Riverside. I would have to take them there. It was a question of flood. I was not going to move them four or five times and wear them out. . . . These trays were stacked in the dry-house, most of them inside, and about four hundred outside. I marked them by writing my name on them in lead pencil—'H. Dewey'—two hundred or three hundred of them; wrote on the edge of the trays. My son and I did that two or three days after the purchase."

J. C. Dewey testified for defendant as follows: "I am acquainted with the trays. On the 2d of March I went with father, and he surrendered the note, and marked the trays with the name of 'H. Dewey'—marked about four hundred trays. There were two rows of trays in the shed. The front row was in view, and I should think we marked about every

fourth or fifth tray with the name of 'H. Dewey,' and the same was true of the trays you could see in opening the doors. The ends of the trays presented themselves to view. One side there was not so many, but only the edges of the trays, and I think we marked those pretty thoroughly. I saw the note surrendered to William Applegarth. I was there off and on for a week or two. Father told me to just keep a lookout for the trays. My brother came about the 5th or 6th of April. I was there once, if not twice, when my brother was there continuously as keeper of the trays. . . . I went away one day, and came back the next day, and I was there until the day before they were seized. I had some business to do up at Plainsburg, and when I came back I found I had left the day before they said the officer came and seized the stuff. . . . I had an understanding with my father that I was there in charge of the trays, and I was there off and on until the day before they were seized. In reference to the trays, I watched them to see that no one touched or moved them off. . . . The roads on the 2d of March were not bad, but the water was rising, and it raised afterward. It was a week or ten days before the water got up. It then went over the road and washed it out. We could always go by a spring wagon. It was some time in June before we could haul loads. I was there to see after the trays, and saw that no one touched them. Mr. Applegarth lived there in the house. I lived in the house, too. I had control, and he didn't. I watched the trays, and saw that nobody tried to move them. A person passing along the road would not see me in charge. . . . There was nothing to indicate to anyone that there had been a sale or delivery of the trays, unless they came and asked about it. The writing on the trays would have indicated a change of possession, and that was the only difference there was after the sale and before. On March 1st the roads were good. The water was rising at the time."

The above was, in substance, all of the testimony bearing upon the question in hand, and it was not, as it seems to us, sufficient to justify the verdict. It did not show such an immediate delivery and subsequent actual and continued change of possession as is required by the statute to make a transfer of personal property valid against creditors of the vendor.

The judgment and order appealed from are reversed and the cause remanded for a new trial.

McFARLAND, J.—I dissent. I think that the judgment should be affirmed.

SKYM et al. v. WESKE CONSOLIDATED CO. et al.

Sac. No. 167; December 18, 1896.

47 Pac. 116.

Mining Contract—Laborer's Lien.—A Contract for Labor on a mine provided that the laborers should receive certain supplies in part payment, and that, after those supplies were paid for, the balance of income remaining should be divided pro rata to the extent of each laborer's wages at three dollars per day. In case of failure of profits, the personal property of the mine should be sold to pay the wages due. Held, that, in the absence of anything to show a profit, an action would not lie to enforce a lien for wages unless it were alleged and proved that there had been a request for a sale of the personal property, and a refusal on the part of the owner.

Mining Contract—Laborer's Lien.—The Contract not Being Restricted in application to the labor performed after it was signed, the actual time of signing is immaterial.

Mining Contract—Laborer's Lien.—The Date When the Contract purported to be signed by plaintiff is conclusive evidence that the labor performed after that date was done subject to its terms.

Mining Contract—Laborer's Lien.—Evidence That a Contract purporting to have been made by plaintiff was read to him, he being unable to read or write, with comments thereon representing that it meant something very different from its true meaning, and that thereupon he assented to it, and authorized his name to be signed thereto, is sufficient to justify a finding that plaintiff did not make the contract.

Attorneys' Fees.—A Judgment for Attorneys' Fees in an Amount in excess of that claimed in the complaint cannot be sustained.

Appeal.—A Finding Based on Conflicting Evidence will not be disturbed on appeal.

APPEAL from Superior Court, Placer County; J. E. Prewett, Judge.

Action by Archibald Skym and others against the Weske Consolidated Company, William Muir and others. From a judgment for plaintiffs, defendant Muir appeals. Modified.

F. P. Tuttle and Pullen & Wallace for appellant; John M. Fulweiler and Ben P. Tabor for respondents.

HAYNES, C.—This action was brought by the plaintiffs to foreclose their several alleged liens for labor performed by them, respectively, upon the Weske Consolidated Placer Mine, of which all the defendants were alleged to be reputed owners, and that defendant Muir was the person in charge, and by whom they were employed. Muir answered, alleging that at all the times covered by the alleged claims of the several plaintiffs he was and is the sole owner of said mining property. He admitted the employment of the several plaintiffs, the length of time they had labored in the mine, and, except as to plaintiff Skym, the rate of wages agreed upon. He alleged, however, that the labor performed by the plaintiffs, respectively, was under a special agreement, a copy of which was attached to his answer, and which reads as follows:

“We, the undersigned, laborers of the Weske and Mattan claims, accept and subscribe to the following terms, to wit: (1) We agree to receive our board, tobacco, and clothes. (2) The balance due us to be received over and above expenses for supplies, etc., for working mine. (3) The provision bill and supplies for the mine to be paid first, and the balance over to be divided pro rata amongst us until such pro rata makes up our full quota of three dollars per day.

“If I, Wm. Muir, should fail to pay from proceeds hereinbefore referred, I, Wm. Muir, agree to co-operate with men in making sales of all personal property to make up said wages with the least possible cost.

“WM. MUIR.”

This agreement was signed by plaintiff Skym under date of April 15, 1893, and by plaintiff Jones under date of December 21, 1893, but does not show that it was signed by plaintiff Bowen. This agreement was set out in the finding made by the court, and in relation to said agreement the court found that the defendant William Muir did not perform the conditions of said agreement, and thereafter, and before the fourth day of August, 1894, failed and refused at divers times to co-operate with the said Skym in making sales of personal property to pay the wages due to the said plaintiffs Skym and Jones, or to perform the other conditions of said agreement by him to be performed. No question was made as to the form

or sufficiency of the said liens filed, and the court sustained the lien of plaintiff Bowen, who had not signed said agreement, and denied the liens of plaintiffs Skym and Jones, but gave personal judgment against defendant Muir for the amount found due said Skym and Jones, respectively, and entered judgment foreclosing the lien of plaintiff Bowen. Defendant Muir moved for a new trial, his motion was denied, and this appeal is from the judgment and the order denying his said motion.

The only errors specified go to the sufficiency of the evidence to justify the findings, and to an alleged variance between the allegations of the complaint and the evidence. The genuineness and due execution of said agreement were not denied under oath, and were therefore admitted: Code Civ. Proc., sec. 448. It was also alleged in the answer that by mistake there was omitted from said agreement a provision to the effect that, in case any of the laborers quit work before they had been paid from the proceeds of the mine, they should forfeit all claim to compensation, and that by mistake the name of respondent Bowen was not subscribed to the contract; and a reformation of the contract is sought as to these alleged omissions. The court found against appellant in relation to these alleged mistakes and omissions, and, as the evidence was conflicting, that finding cannot now be disturbed. The allegations of the complaint in respect to the hiring of the plaintiffs, respectively, were that a contract was entered into with each of them, whereby it was mutually agreed and contracted that the defendants should hire said plaintiffs to work as miners in said mining claims at the agreed price of three dollars per day, payable in cash, gold coin, as fast as said labor was performed; that such hiring should continue as long as mutually agreeable; and that, in pursuance of said contract, said plaintiffs worked the number of days alleged. The findings of the court substantially followed the language of the complaint as to the agreement or terms of hiring, but inserted the words "except as modified as hereinafter stated," and in the next finding set out the said written agreement, a copy of which the defendant attached to his answer. The written agreement fixed the wages of the laborers who signed it (unless as to plaintiff Skym), and the mode or manner of payment, and the sources from which payment should be made. It is true, there is no clause declaring that, if the employees

should quit before enough to pay them had been realized from the mine, they should forfeit all pay except that which they had received before quitting; and we may further assume that, after the profits of the mine and the proceeds of the personal property had been exhausted, appellant would be personally liable to those who signed the contract for any deficiency, since the rate of wages was fixed, and there was no provision by which any part of their wages should, in any contingency, be forfeited. But we think it equally clear that, as to those who signed said contract, no part of their compensation became due except that which they were to take in boarding, tobacco, and clothes, until it should be realized from the profits of the mine, and if no profits, or insufficient profits, were realized, until a refusal on the part of Muir to apply the personal property or its proceeds to the payment of their wages. If the plaintiffs Skym and Jones had set out this agreement in their complaint, it is evident they would not have stated a cause of action without alleging facts showing a breach of the contract by defendant Muir, since the mere statement of the amount earned, and that a certain balance was unpaid, would not show that such balance was due or payable when the action was commenced.

Whether, in view of the allegations of the complaint as to the terms of the contract under which the labor was performed, and the admission made by the plaintiffs by their failure to deny the genuineness and due execution of the written contract set out in the answer and the testimony relating thereto, there was a material variance between the allegations of the complaint and the evidence, as appellant contends, or whether it was a failure to prove the contract alleged by the plaintiffs, need not be determined. By whatever name it may be called, the result must be the same. It was realized by the court below that, as to the plaintiffs Skym and Jones, the written contract, if performed by Muir, must defeat their action; but the court found, as to each of said plaintiffs, that defendant Muir "did not perform the conditions of said agreement, and thereafter, and before the fourth day of August, 1894, failed and refused at divers times to co-operate with the said Skym in making sales of personal property to pay the wages due and owing to said Skym, or to perform the other conditions of said agreement by him to be performed, and on the fourth day of August, 1894, there was and became due and

owing to plaintiff Skym on said contract of employment" the sum demanded. A similar finding was made as to plaintiff Jones. These findings are not sustained by the evidence. There is no evidence tending to show that anything was realized from the mine beyond the expenses, which, under the agreement, were to be first paid. Skym was foreman, and he testified that but little was taken out of the mine, and nowhere is there any evidence that any profit was realized, which, under the contract, was to be distributed to the men; nor is it shown that the enterprise was abandoned, nor that any request was ever made for the sale of the personal property, or that there was no personal property to be sold. It is therefore clear that as to the judgments in favor of Skym and Jones there must be a reversal. It may be that, upon the facts as they really exist, Skym and Jones may each be entitled to a personal judgment against defendant Muir. What is now decided as to them is that, upon the pleadings, and the evidence appearing in the record, neither of them is entitled to such judgment.

Some question is made as to when the written contract was signed. As to Skym and Jones, the dates attached to their signatures, whether the true dates at which their signatures were written or not, are, in the absence of satisfactory evidence to the contrary, conclusive evidence that the labor performed after that date was done under its terms and conditions; and we also think that the time when the contract was actually signed is immaterial, for the reason that it was not limited to work done thereafter, and that it applied as well to compensation theretofore earned, and remaining unpaid, as to earnings which accrued thereafter.

In the absence of proper allegations and proof of mistake or omission in the written agreement touching the wages of plaintiff Skym, he is bound by the rate therein expressed. The facts affecting Bowen's judgment are different. His name was not signed to the contract. Concerning this agreement, Bowen testified: That he did not have an understanding with Muir that he was to get three dollars per day, that he was to furnish him with grub, clothing and tobacco, and that he was to look for the balance of the three dollars per day from the mine itself. That Muir wanted him to sign this paper, and he asked him what he wanted him to sign that for, and he said, "Only to get my money"; that when they got

down they would have plenty of money; that he meant from No. 3, which is a tunnel. That Muir said there was plenty in there, and it was coming out of the mine. He further testified that the agreement was read to him by Mr. Yarnold, and that he authorized Yarnold to sign it for him; that he could neither read nor write; that Yarnold told him "it was to work down in No. 3, and get the water out, and we would have plenty of money—all the money we wanted"; that he did not understand that he was to wait until the money came out of the mine. That Muir and Yarnold made these statements to Bowen is not disputed. It would appear from Bowen's testimony that the paper was read with running comments thereon, so that his assent to the contract and his direction to Yarnold to sign it for him were based, not upon the reading of the paper itself as it was in fact written, but were based upon the supposition that the paper contained and meant all that was said. We think the evidence was sufficient to justify the court in finding that Bowen did not make the contract set out in the answer of defendant, and in sustaining his lien. The court erred, however, in the allowance of \$250 as an attorney's fee for foreclosing his lien. The allegation in the complaint is that \$150 is a reasonable sum to be allowed for the foreclosure of Bowen's lien, and no more than that sum can be allowed.

As to plaintiffs Skym and Jones, the judgment and order appealed from should be reversed, with leave to amend their complaint; and, as to plaintiff Bowen, the judgment should be modified by reducing the allowance of attorneys' fees for foreclosing the lien to \$150, and, as so modified, the judgment in his favor and the order denying a new trial as to his cause of action should be affirmed.

We concur: Searls, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed as to the plaintiffs Skym and Jones, with leave to amend their complaint; and, as to the plaintiff Bowen, the judgment is modified by reducing the allowance of attorneys' fees for foreclosing the lien to \$150, and, as so modified, the judgment in his favor, and the order denying a new trial as to his cause of action, are affirmed.

LIVINGSTON et al. v. WIDBER, Treasurer.

S. F. No. 370; December 28, 1896.

47 Pac. 247.

Mandamus—Defense.—Where, Pending an Appeal by a City Treasurer from an order directing him to pay certain coupons out of certain moneys paid in under protest, the action by the property owners, who paid in the money, to recover the same, is determined against them, the defense, to the issuance of the writ, of the pendency of such action, is unavailable.

APPEAL from Superior Court, City and County of San Francisco; James M. Seawell, Judge.

Proceeding by one Livingston and others against one Widber, treasurer, etc., for a writ of mandate. There was a judgment for petitioners and defendant appeals. Affirmed.

Harry T. Creswell for appellant; E. B. & George H. Mastick and Freeman & Bates for respondents.

PER CURIAM.—The plaintiffs sought by this proceeding a writ of mandate commanding the defendant, as treasurer of the city and county of San Francisco, to pay certain coupons of the Dupont street bonds. The defendant pleaded as a defense to the proceeding that the moneys in his hands belonging to the Dupont street fund had been paid in under protest, and that the parties paying the same had instituted an action, entitled "Davis v. The City and County of San Francisco," which was then pending in this court, and undetermined, for the recovery of the moneys so paid, and that for this reason he was entitled to retain the same until the determination of that action. The superior court, however, rendered judgment awarding the writ, from which he appealed. Since the appeal was taken, the action of Davis v. City and County of San Francisco, has been determined by this court against the plaintiff therein (115 Cal. 67, 46 Pac. 863), by which the defense alleged in the present action has become unavailing. The judgment is affirmed.

BARNHART v. EDWARDS et al.

Sac. No. 150; December 28, 1896.

47 Pac. 251.

Mortgage—Future Advances—Parol Evidence.—Where a conveyance was made as security for certain money advanced, parol evidence is inadmissible to show that, by agreement with the attorney of the grantor, the effect of the instrument was changed so as to also secure future advances.

Mortgages—Future Advances—Taxes.—An instrument by which land was conveyed to secure advances, which provided for the repayment of all taxes upon the lands conveyed, did not invalidate the agreement under constitution, article 13, section 5, providing that contracts for payment of taxes upon the "money loaned" should be void.

Mortgage—Foreclosure—Pleading.—An Instrument Conveyed certain lands to secure, among other matters, a loan of \$2,500, secured by a pledge of certain wheat. Held, in an action to foreclose the lien, that, as the note was expressly named as one of the debts secured, it was incumbent on defendant, if he would avoid liability therefor, to plead the facts by virtue of which the land had been exonerated from this liability.

Appeal.—An Assignment That the Court Erred in finding that a certain sum was due from defendant to plaintiff is not a specification of the "particulars" in which the evidence is insufficient to sustain the finding.

Pledge—Attachment—Conversion.—Where Wheat Pledged is taken from the possession of the pledgee in attachment against the pledgor, and the litigation in relation thereto is conducted by the attorneys of the pledgor, the pledgee cannot be charged with conversion when the attachment is sustained.

Mortgagee in Possession—Extent of Liability.—Certain Land was transferred to plaintiff to secure a loan. At the time of the transfer, it was under a lease which the lessee subsequently assigned to plaintiff. Held, by thus getting possession, plaintiff became the mortgagee in possession, and was liable to defendants only for the income and profits received from the land.

APPEAL from Superior Court, San Joaquin County;
Ansel Smith, Judge.

Action by Barnhart against J. T. Davis, Edwards' administrator, and others. Judgment for plaintiff. Defendant Davis appeals. Modified.

P. J. Hazen and Nicol & Orr for appellant; Jas. A. Louttit and Minor & Ashley for respondent.

HARRISON, J.—E. C. Vancil, the intestate of the defendant Edwards, executed to the plaintiff, April 23, 1879, a conveyance of certain lands in the county of San Joaquin, as a security for the payment to him of certain sums of money. The transaction was evidenced by a conveyance absolute in form, and a separate defeasance in the nature of an agreement for the sale of said land to the grantor for the considerations therein named. These considerations consisted, however, entirely of moneys paid out or expended by the plaintiff, and the conveyance of the lands to the plaintiff was intended only as a security for their repayment. The present action is in the nature of a foreclosure, and was brought to obtain judgment against the estate of the grantor for the amount of such payments alleged to be still unpaid, and for the sale of the land in satisfaction thereof. The defendant Mordecai A. Vancil is the son of E. C. Vancil, but is also known by the name of John T. Davis, and under that name has appealed from the judgment rendered in favor of the plaintiff, and also from an order denying his motion for a new trial. The appeal from the judgment was heretofore dismissed upon the motion of the respondent (111 Cal. 428, 44 Pac. 160), leaving only the appeal from the order to be considered. The grounds upon which the appellant urges a reversal of the order are that the court erred in holding that certain advances made to him by the plaintiff were secured by the mortgage, and also that certain items were chargeable against the plaintiff in his account with the mortgagee, and should have been deducted from the advances made by him for which the security was given.

1. The advances of the plaintiff which the appellant contends are not secured by the mortgage consist of four items, viz.: The sum of \$100, paid to Hughes, April 25, 1879, at the request of Davis, upon the claim that it was owed by him; \$250, paid to Davis, June 7, 1880, for which he gave the plaintiff the note of E. C. Vancil; \$100, paid to Davis on his note, April 22, 1881; and \$291.60, paid for a note of Davis, pur-

chased from Long, August 2, 1881. The sums of money for whose repayment the security was given, as expressed in the instrument of defeasance, are the following: The \$2,300 named in the deed of conveyance as its consideration, and which was used in paying certain debts against Davis in the city of Stockton; a note for \$2,500 that had been executed by Davis to the plaintiff, and for which certain wheat had been pledged as security; the costs and expenses, including attorneys' fees, incurred, and that might be incurred, in certain litigation concerning said wheat; and all taxes that the plaintiff should pay on the land. It is very clear that any moneys that might be thereafter paid to Davis, or advanced by the plaintiff for his benefit, are not included in these items, or in the purpose for which the security, as expressed in the instrument, was given. It was, however, contended by the plaintiff that there was a parol agreement between the parties to the transaction that it should be security for such advances as the plaintiff might thereafter make to Davis; and, against the objection of defendants, evidence was introduced for the purpose of sustaining this contention. That such evidence was improperly admitted is evident from the provisions of section 2922 of the Civil Code, as well as from the general rule that parties to a written instrument are presumed to have incorporated therein all the terms of their agreement, and that its contents cannot be varied by parol. But, irrespective of this rule, we are of the opinion that the plaintiff failed to show that it was intended by the parties that these advances should be secured by the instrument. Judge Budd, by whom the instrument was drawn, testified that, as far as he could remember, he embodied therein all the agreements of the parties as they were stated to him, and that the instruments were read and explained to them before they were signed; and he was unable to say that they gave him any instruction that the mortgage was to be security for subsequent advances to Davis. Davis himself was not present at Budd's office when the instruments were drawn, and the plaintiff testified that he helped dictate the deed and heard the agreement read after it was prepared, and that no dissatisfaction was expressed; and he does not testify that it was agreed, or that it was the intention of the parties, that it should be a security for such advances. The effect of the instrument could not be changed by any subsequent parol declaration by Vancil's attorney of

the object of the instrument, or by the fact that the plaintiff made the advances upon his assurance that they should be thus secured.

2. The agreement for the repayment of all taxes upon the land described in the instrument of defeasance does not fall within the purview of section 5 of article 13 of the constitution. This provision does not invalidate an agreement by the mortgagor to pay the taxes upon the "land" mortgaged, but is limited to the taxes upon the "money loaned," or the "mortgage, deed of trust or other lien." By section 4 of the same article the mortgage is, for the purposes of assessment and taxation, to be treated as an interest in the property affected thereby, but only such value as there may be to the property so affected after deducting the value of the security is to be taxed to the owner of the property; the value of the security is to be assessed and taxed to its owner. It does not appear that any of the taxes paid by the plaintiff were upon the security, or other than those which were assessed upon the land after deducting the value of the security. If the defendant would claim the right to rely upon the provisions of section 5, it was incumbent upon him to show the existence of the circumstances under which the provision may be invoked.

3. At the time of the execution of the mortgage, the wheat that had been given in pledge for the payment of the \$2,500 note had been attached in an action against Davis, and taken from the possession of the plaintiff. This wheat belonged to Vancil, and had been pledged by Davis to secure his own note; but by the instrument of April 23, 1879, Vancil ratified the transfer by Davis to the plaintiff. Davis also testified that all the business done by him since 1876 had been done by him under his name of Davis, but for Vancil; and it was also shown that, prior to the commencement of the present action, Vancil had conveyed to Davis all real and personal property owned by him in the state. Prior to the execution of the instruments of April 23, 1879, the plaintiff had brought a suit in replevin for the wheat, and judgment in that action was thereafter rendered against him, and the wheat sold in satisfaction of the judgment in the suit against Davis, wherein it had been attached. It is contended by the appellant that it was the duty of the plaintiff to defend the possession of the wheat, and that, by reason of his failure so to do, the court should have charged him with its conversion, or with its value

above the amount for which it was pledged to him. No such issue is, however, presented by the answers of the defendants; and it does not appear from the record that any proposition of this nature was submitted to the court below. In his assignments of errors of law, the plaintiff has specified that the court erred "in charging defendant and the premises mortgaged with the \$2,500 secured by pledge of the wheat sued for in the case of *Barnhart v. Fulkerth* [93 Cal. 497, 29 Pac. 50]"; but, as this note was expressly named in the mortgage as one of the debts secured by it, it was incumbent upon the appellant, if he would avoid liability therefor, to set forth in his answer the facts by virtue of which he would claim that the land had been exonerated from this liability. The further assignment that the court erred in finding that the sum of \$7,668.12 is due from the defendant to plaintiff cannot be considered as a specification of the "particulars" in which the evidence is insufficient to sustain this finding. But, disregarding the absence of an issue upon this proposition, we are of the opinion that it sufficiently appears from the record that the court did not err in refusing to charge the plaintiff with the loss of this wheat. After the plaintiff had introduced evidence of the amount yet unpaid upon the obligations for which the security was given, if the defendants would reduce this amount it was incumbent upon them, whether authorized by the pleadings or not, to offer evidence sufficient in law to be available for such reduction, from which the court could determine the amount by which the reduction should be made. The defendants offered in evidence the findings by the court in the replevin suit of the plaintiff, that, prior to the attachment in the suit against Davis, the sheriff had tendered to the plaintiff the sum of \$2,600, and the plaintiff testified that he received \$2,500 from that suit. In the findings herein, he is charged with \$2,540, as of November 19, 1892; and it seems to be admitted in the briefs of counsel that this was for the tender made by the sheriff when the wheat was taken. There is, however, no evidence in the record of the value of the wheat, or of the amount for which it was sold by the sheriff. Unless it had some value beyond the amount for which the plaintiff has been charged in his account, there is nothing with which he should have been charged, and it was for the defendants to show that it had such value. The plaintiff cannot be charged with a conversion of

the wheat. It was taken from his possession by the arm of the law, and the record fails to show any affirmative act of his by which it was lost to the defendants. On the contrary, it appears that the litigation was conducted by the attorneys of Davis, who was the agent of Vancil, and acting for him, and by whose advice the plaintiff declined to take the money when tendered him. The defendant cannot invoke in this action, as conclusive upon the plaintiff, any findings made by the court in the replevin suit, in which he was not a party.

4. In October, 1876, the land conveyed to the plaintiff was leased to Hughes for the term of five years, at a rent of \$1,500 per annum; and in September, 1880, Hughes made an assignment of this lease to the plaintiff. It is contended by the appellant that, by reason thereof, the plaintiff, as assignee of the land, became liable for the rent thereby reserved for the succeeding year, and should be charged with this amount in his account. As has been said with reference to the wheat transaction, this was a defense which must be affirmatively established by the defendants in order to render it available; and the record fails to show that the court erred in not holding that it was established. Although there was testimony that Hughes did, in fact, make an assignment of the lease to the plaintiff, yet at that date the plaintiff was the legal holder of the title to the land, and was, in fact, the landlord of Hughes; and the transaction was intended to be, and did in reality constitute, a surrender of the term by which the plaintiff, as landlord, was restored to the possession of the leased premises. The plaintiff testified in reference to this transaction: "Hughes could not carry on the ranch. He threwed it up, and, at Davis' request, I carried it on. Hughes assigned the lease to me, and I took a new lease at the same time." By thus getting possession of the land, the plaintiff became a mortgagee in possession, and was liable to the defendants for only such income and profit as he may have received from the land. He testified that he never collected any rent from Hughes, and it appears that he has fully accounted for all the income and profits derived from the land during the time he was in possession.

The superior court is directed to deduct from the amount which it has found due to the plaintiff, as set out in finding 7, the items of \$100, paid to Hughes, April 25, 1879; \$250, paid to Davis, cash, on note June 7, 1880; \$100 paid to Davis,

cash, on note April 22, 1881; and \$291.60, paid for note to Long, August 2, 1881, with whatever interest has been allowed by reason of said items, and to make a corresponding amendment of its conclusions of law. The order denying a new trial will thereupon be affirmed. Judgment will then be entered in accordance with the findings as thus corrected.

We concur: Van Fleet, J.; McFarland, J.

HEINTZ v. COOPER.

S. F. No. 479; December 31, 1896.

47 Pac. 360.

Trial.—A Finding, "That the Matters and Facts Alleged in defendant's special defense and cross-complaint on file herein, except the allegations of plaintiff's employment, and agreements under such employment, are untrue in substance and in fact," supports a judgment for plaintiff, where the answer and cross-complaint both allege that defendant employed plaintiff as a physician and surgeon, for a reward, and that plaintiff undertook the service, whereby defendant was damaged by plaintiff's negligence and incompetency.

Physician.—Where Plaintiff Sues for Services as Physician, and defendant, by a cross-complaint, seeks damages for alleged negligent treatment, and plaintiff, in answer, alleges that defendant's suffering was aggravated by his own negligence and failure to follow plaintiff's directions, a finding that all the facts alleged in the cross-complaint, except that of plaintiff's employment, "are untrue," renders the issue of defendant's negligence immaterial, and a finding as to it is not required.

Physician—Compensation.—In Determining What is a Reasonable compensation for surgical and medical services in a given case, the skill and learning of the operator and the character and circumstances of the subject to which he devotes his services must be considered, and the rule that compensation is determined by "the usual price at the time and place of performance" does not necessarily apply.

Evidence.—Possible Error in the Exclusion of Evidence, on an issue which could not have affected the judgment, is harmless.

Physician—Malpractice.—Before a Witness can Testify on the issue of a physician's neglect and unskillful practice, his competency must be shown.

APPEAL from Superior Court, Monterey County; N. A. Dorn, Judge.

Action by J. P. E. Heintz against J. B. H. Cooper. From a judgment in favor of plaintiff and an order denying a new trial defendant appeals. Affirmed.

S. F. Geil and John J. Wyatt for appellant; W. A. Kearney for respondent.

HAYNES, C.—This action is prosecuted to recover for services rendered by the plaintiff as a physician and surgeon. The complaint contains two counts—the first upon an account stated, amounting to \$1,200, and admitting a payment thereon of \$500; and the second count alleged said services to be reasonably worth \$2,500, the whole of which remained unpaid except the sum of \$500. The defendant denied all the allegations of the complaint, and for a second defense alleged negligence, incompetency and unskillfulness on the part of the plaintiff, whereby he was made sick, and kept from attending to his business, for more than six months, and compelled to pay \$1,000 for nursing and medical attendance, and “is permanently a cripple, to his damage in the sum of \$3,000.” The same allegations are stated in a cross-complaint, in which defendant seeks to recover damages in the sum of \$4,000, and to which cross-complaint the plaintiff filed an answer. The cause was tried by the court without a jury. The findings were against the plaintiff upon the first cause of action. Upon the second cause of action the court found the reasonable value of plaintiff’s services to have been \$750, of which sum \$500 had been paid. As to the special defense and counterclaim pleaded by the defendant, the court found against him. A judgment in favor of the plaintiff for \$250 was entered, and defendant appeals therefrom, and from an order denying a new trial.

1. It is contended that the findings do not support the judgment. This contention is based upon the fourth finding, which is as follows: “That the matters and facts alleged in the defendant’s special defense and cross-complaint, on file herein, except the allegations of plaintiff’s employment and agreements under such employment, are untrue in substance and in fact, and offered only as a bare pretense, without any justification or excuse whatever.” The answer and cross-complaint both alleged that defendant employed the plaintiff as a physician and surgeon, for a reward, to set

his leg, and dress and heal the same, and that plaintiff undertook to set and dress said leg for said defendant, and then proceeds to allege negligence, want of skill, etc., and damages resulting therefrom. Findings by reference to the pleadings, or parts thereof, have been frequently criticised by this court, and where such findings involve uncertainty as to what facts are found they are uniformly held insufficient; but where "they do show what facts are found, and there is no uncertainty about them," they are sustained: *Davis v. Drew*, 58 Cal. 157. The finding here in question is clear and certain, and, though the mode "is not to be commended," justice must not be sacrificed to form.

Appellant's contention that a portion of plaintiff's answer to the cross-complaint consisted of an allegation of new matter, and which is presumed to be controverted, raised a distinct issue upon which there is no finding, cannot be sustained as a ground for reversal. The finding that all the facts in the cross-complaint alleged, except, etc., "are untrue," covered all the allegations in the cross-complaint to which the alleged new matter applied; and such finding, which cut up by the roots the allegation that he suffered great pain in consequence of plaintiff's negligence and incompetency, rendered it wholly immaterial whether the defendant's "pain was caused or increased by his own negligence and his failure to observe plaintiff's directions," as alleged in the answer to the cross-complaint. A finding either way upon the question of defendant's negligence could not affect the result, and in such case the fact becomes immaterial, and no finding is required.

2. It is further contended that the evidence is insufficient to support the finding that the plaintiff's services were reasonably worth \$750, or any greater sum than \$500, which had been paid. The injury to the defendant, treated by the plaintiff, consisted of a compound fracture of the leg and a dislocation of the ankle joint. Both the bones were broken and protruded through the flesh, and six or seven pieces of the bone were removed. Plaintiff's services commenced July 12th, and continued until the 13th of the following October, during which time, the plaintiff testified, he made about two hundred visits, and about seventy of these were for the purpose of dressing the wound. The testimony on the part of the plaintiff was that for visits when the wound was dressed

five dollars to ten dollars per visit was a reasonable charge, and for other visits two dollars and fifty cents each, and for reducing a compound fracture of the leg \$250 to \$500 is a reasonable compensation. This evidence would have justified the court in finding in favor of the plaintiff in a much larger sum. On the part of the defendant the medical testimony was that \$500 was a reasonable compensation for all services rendered by the plaintiff, though the testimony on behalf of the plaintiff as to a reasonable compensation for visits and for dressing the wound was not controverted. It appeared, however, that in no case in Monterey county within the knowledge of the medical witnesses had so large fees, in the aggregate, been paid in cases of compound fracture, though in none of the instances mentioned was the character of the fracture or the number of visits stated; and it is now contended, on behalf of appellant, that the prices so paid in those other cases in that county determine what is a reasonable compensation for plaintiff's services in this case, or, as counsel state it, "the usual price at the time and place of performance is the rule." The cases cited in support of this proposition relate to ordinary services, as to which there is a reasonably uniform established rate of compensation, and not to professional services, where the skill and learning of the person, as well as the almost infinite variety in the character and circumstances of the subject upon which he devotes his services, precludes the establishment of any fixed rate of compensation which could be applied to more than a very restricted class of cases and the more common class of services. Besides, defendant's witnesses testified that no medical society existed in Monterey county and no fee bill or scale of charges had been fixed, but each charged according to his ideas of what was proper.

3. During the examination of the defendant, as a witness in his own behalf, he testified that he had sustained damage by reason of the plaintiff's incompetent and unskillful treatment. His counsel then asked: "What did those damages consist of?" An objection to this question was sustained. Whether there was error in this ruling need not be considered; for, whatever may have been the suffering the plaintiff endured, or whatever his crippled condition, or whatever may have been the expense to which he was put, unless such suffering, condition and expense were caused by or resulted from

the incompetency, negligence or unskillfulness of the plaintiff, no recovery could be had by the defendant therefor; and, as the court found, upon sufficient evidence, that all the allegations of the defendant's answer and cross-complaint in that behalf were untrue, a rehearsal of those matters could not have changed the result, and the error, if it was error, did not prejudice the defendant, and therefore constitutes no ground for a reversal. If, on the other hand, the question was put for the purpose of proving the incompetency or negligence of the plaintiff, the witness was not shown to be competent to testify upon that subject, and upon that ground the ruling was right. The judgment and order appealed from should be affirmed.

We concur: Searls, C.; Britt, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

JOHNSTON v. COUNTY OF LOS ANGELES.

L. A. No. 217; January 8, 1897.

47 Pac. 374.

Constables.—The Compensation of a Constable is Regulated by the provisions of the county government act (Stats. 1893, p. 390); and the provision limiting the amount of compensation he shall receive is valid.

APPEAL from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by J. H. Johnston against the county of Los Angeles. Judgment for defendant and plaintiff appeals. Affirmed.

Jones & Newby and Jos. F. Chambers for appellant; J. A. Donnell, district attorney, and F. R. Willis for respondent.

PER CURIAM.—In Dwyer v. Parker, 115 Cal. 544, 47 Pac. 372, it was held that the provisions of the "Act to establish the fees of county and township, and other officers, and jurors

and witnesses, within this state" (Stats. 1895, p. 267), so far as the same attempt to fix the compensation of the officers therein named, are unconstitutional. The compensation of the appellant, as constable of Los Angeles township, is fixed by subdivision 14 of section 164 of the county government act of 1893 (Stats. 1893, p. 390). By the provisions of that section he is not authorized to receive any greater amount than is admitted in his complaint herein has been received by him for the services for which his present claim is made. We have no doubt of the constitutional power of the legislature to limit the amount of compensation which any officer shall receive for the performance of the duties of his office. The judgment is affirmed.

BARRETT v. SUPERIOR COURT OF PLACER COUNTY.

S. F. No. 539; January 18, 1897.

47 Pac. 592.

Administrator—Failure to Give Security.—Under Code of Civil Procedure, section 1395, which provides that, if sufficient security is not given within the time fixed, the right of an administrator to the administration shall cease, etc., where an administratrix fails to comply with the order, and obtains no further time, she is not entitled to notice of an order revoking her letters after the limitation has expired.

Administrator—Failure to Give Security.—Where There has Been a failure to comply with an order for an administratrix to give additional security, an order "that the right of the administratrix to the administration of this estate cease" cuts off her powers, and ousts her from office.

Application by Maggie G. Barrett against the Superior Court of Placer County (J. E. Prewett, Judge), for a bill of review. Writ discharged.

George B. Merrill for petitioner; Benjamin P. Tabor for respondent.

GAROUTTE, J.—This is an application for a writ of review, asking the court to annul an order made by the superior court of Placer county in the month of May, 1896, appointing one Mitchell administrator of the estate of Joseph Byrn,

deceased. It is claimed that such order was beyond the jurisdiction of the court.

Petitioner, Maggie Barrett, was the administratrix of the estate of said deceased. Upon the fifteenth day of June, 1895, the judge of said court issued a citation to her and the sureties upon her bond, ordering them to appear before him upon a certain named day and be examined as to their property and its value. This hearing resulted in the court making an order, upon July 1, 1895, that the administratrix furnish additional security in a certain named amount within the next five succeeding days. This additional security was not furnished to the judge within the time fixed, but a new bond was presented to the judge for approval some seven days thereafter, and approval thereof was refused. Upon July 9th, at the hour of 10 A. M., said superior court made the following order, which was duly entered in its minutes, in the matter of the estate of Joseph Byrn, deceased: "That the right of the administratrix to the administration of this estate cease." Thereafter, upon the same day, at 2 P. M., the court made the following order, which was entered in the minutes: "That her powers as such administratrix be, and the same are hereby, suspended, and her letters as such revoked, until the further hearing upon the question of her permanent removal, now pending, to be heard on September 12, 1895."

Petitioner sustains her application for the writ upon the ground that her letters of administration had not been revoked when her successor was appointed, and, in fact, never have been revoked, and hence such appointment was without the court's jurisdiction. Some of the orders of the superior court made in this case have already been before us upon a writ of review (see *Barrett v. Superior Court*, 111 Cal. 154, 43 Pac. 519), and it was there, at least incidentally, held that a failure to comply with the order of the court requiring the giving of additional security resulted, ipso facto, in a revocation of her letters. This court said: "Section 1395 does not require any order to be served upon the administratrix, but declares that the mere failure to give the security within the time fixed by the judge's order shall, of itself, without any further action on the part of the court, cause the right of the administrator to the administration to cease." The section declares: "If sufficient security is not given within the

time fixed by the judge's order, the right of such executor or administrator to the administration shall cease, and the person next entitled to the administration on the estate, who elects to give a sufficient bond, must be appointed to the administration." This language is clear, explicit and positive, and we are not at all prepared to say that the construction given it in the former opinion of the court is not the correct one.

Conceding the letters of the administratrix were not revoked by operation of law, then we have the order of 10 A. M., July 9th, that the right of the administratrix to the administration of this estate cease. If her powers and rights as administratrix did not, *ipso facto*, cease upon her failure to file the bond within the time required, then this order of the court cut off those powers and rights, and completely ousted her from office. The validity of this order is attacked upon the ground that it was made without notice. But no notice is required by the statute, and no notice was necessary. Both the court and the administratrix knew all the facts. There was no evidence to take. The administratrix was required to file additional security within five days. When she failed to comply with the order, and obtained no further time in which to comply with it, either one of two results necessarily followed; that is, by operation of law she was no longer administratrix of the estate, or, if an order of the court was necessary to revoke her letters, then they were revoked, for such an order was made. With either construction of the statute, her position is equally unfortunate. It is evident that the order was intended to revoke her letters. There was no other reason for making it. It meant this, or it meant nothing. It was broad enough to cover the ground. It was not required to be in any particular form, and was sufficient to serve every purpose intended.

The order made at 2 P. M. upon July 9th becomes immaterial, and the consideration of it unnecessary in view of the construction given the order of 10 A. M. If petitioner was removed from office by an order made at 10 A. M., and her letters revoked, an order made some hours later served no effective purpose, unless it could be construed as setting aside the earlier order. It does not purport to do so. This could hardly be its construction by implication; and, in the absence of express and direct language indicating such inten-

tion on the part of the court, we could not so hold. We find no such clear intention in the order. It is recited in the record that the later order was made by mistake and inadvertence. Whatever may be the true reason is immaterial, and the order of 10 A. M. must stand. The administratrix having been ousted from office, and her letters revoked, the court did not exceed its jurisdiction in appointing her successor. For the foregoing reasons the writ is discharged.

We concur: Van Fleet, J.; Harrison, J.

PEOPLE ex rel. WIRT v. BUDD.

S. F. No. 775; January 19, 1897.

47 Pac. 594.

Mandamus—Appointment of Police Commissioners.—A Citizen is not "beneficially interested" (Code Civ. Proc., sec. 1086) in the appointment of police commissioners for the city and county of San Francisco, so as to entitle him to sue, without permission of the attorney general, for a writ of mandate to compel the governor to make such appointment.¹

Petition, on the relation of N. S. Wirt, against James H. Budd, for a writ of mandate. Dismissed.

N. S. Wirt for relator; Davis Louderback for police commissioners; W. F. Fitzgerald, attorney general, and D. H. Anderson, deputy attorney general, for defendant.

PER CURIAM.—This is an application, on notice, for a peremptory writ of mandate to the governor of California to appoint two police commissioners for the city and county of San Francisco. The attorney general moves to dismiss the proceeding, upon the ground that the relator has received no authority to sue in the name of the people of the state, and that he is not himself a party beneficially interested (Code Civ. Proc., sec. 1086), in any sense that distinguishes

¹ Cited and followed in *Fritts v. Charles*, 145 Cal. 513, 78 Pac. 1058, where the plaintiff, a private person, sought, by mandamus, to compel a justice of the peace to issue a warrant of arrest.

him from other citizens of the state. The grounds of the motion are conceded, and the motion must be granted: *Linden v. Supervisors*, 45 Cal. 6; *Ashe v. Supervisors*, 71 Cal. 236, 16 Pac. 783; *Colnon v. Orr*, 71 Cal. 43, 11 Pac. 814; *Marini v. Graham*, 67 Cal. 130, 7 Pac. 442. Proceeding dismissed.

LEET et al. v. BOARD OF SUPERVISORS OF KERN COUNTY.

L. A. No. 202; January 22, 1897.

47 Pac. 595.

Liquor License—Appeal.—Where a Board of Supervisors Refuses a liquor license, and, after a peremptory writ of mandate, approves the bond filed by the applicants, and orders the license to issue, it cannot appeal from the judgment of mandate.¹

Liquor License.—An Appeal by Supervisors from a Judgment of mandate requiring it to issue a liquor license, when the hearing is after the license has expired, will be dismissed.²

APPEAL from Superior Court, Kern County; A. R. Conklin, Judge.

Petition by Leet & Lang, copartners, for a writ of mandate to the board of supervisors of Kern county, requiring them to grant petitioners a license to retail liquors. From a judgment of mandate and from an order denying a new trial the board appeal. Dismissed.

¹ Cited with approval in *Betts v. Jorgenson*, 67 Neb. 204, 93 N. W. 168, where a director of a school district, after complying with a mandamus requiring him to approve a treasurer's bond (and that before his motion for a new trial had been disposed of), had sought for a review of the proceeding by writ of error.

Cited and followed in *Diefenderfer v. State ex rel. First Nat. Bank of Chicago*, 13 Wyo. 400, 80 Pac. 670, which was the case of a mandamus requiring a municipality to issue water bonds in accordance with an ordinance, the relator claiming rights under a contract between it and the municipal authorities.

² Cited and followed in *Knight v. Hirbour*, 64 Kan. 566, 67 Pac. 1105, where, in a controversy for the possession of a corpse, a mandatory injunction had been issued requiring an undertaker to surrender the subject matter.

Alvin Fay for appellants; Laird & Packard and J. W. Mahon for respondents.

SEARLS, C.—The appellants constitute the board of supervisors in and for the county of Kern, state of California. Ordinance No. 52, adopted by the board of supervisors of the county of Kern, provides for the issuance of license to sell at retail spirituous, malt or fermented liquors or wines. The ordinance provides the mode of application, time of hearing the application, etc., and then provides as follows: "The board of supervisors shall deny the said application for license, and refuse license to be issued thereunder, if on such hearing it shall appear to the satisfaction of the board, either that applicant for such license is an unfit and not a proper person to have or to hold such license, or that such application is not made in good faith, or that the statements made in such application are untrue, or that there is any other sufficient reason for such refusal, whether shown by protest on file, location of saloon or otherwise." Leet & Lang, copartners, filed their application for a license to retail liquors, etc., on block 231, in the town of Bakersfield, county of Kern, accompanied by the recommendation of a majority of the owners of lots in said block 231, as by the ordinance required. A hearing of the application was had, and testimony pro and con received, whereupon the board finally refused to grant the license. Thereupon applicants procured from the superior court an alternative writ of mandate, which, after answer by the appellants here, and upon a hearing, was on the twenty-second day of October, 1895, made peremptory. A copy of the peremptory writ was served upon the supervisors, and, as is shown by the record, they on the same day, to wit, October 22, 1895, approved the bond filed by applicants, and ordered the license to issue. This appeared on the hearing of the motion for a new trial subsequently made, and may have been the reason for a denial of that motion. Under these circumstances, we recommend that the appeal herein be dismissed, for two reasons:

1. As was said in *San Diego School Dist. of San Diego Co. v. Board of Supervisors of San Diego Co.*, 97 Cal. 438, 32 Pac. 517, which was in all essentials similar to this: "The defendant voluntarily complied with the mandate of the court, and the judgment was thereupon satisfied, and its

force exhausted. After it had thus been satisfied, there was nothing in the judgment which the court had rendered of which the defendant could complain, or about which it could say that it was aggrieved." A reversal of the judgment here would not have the effect to annul the license, "nor did the appellants, by compliance with the judgment, lose any property rights of which restitution could be made in case of reversal."

2. As the license issued October 22, 1895, more than one year since, we may well suppose that it has served its purpose, and that all rights thereunder have ceased to exist: *Foster v. Smith*, 115 Cal. 611, 47 Pac. 591, dismissing an appeal under similar circumstances, and citing *People v. Common Council of Troy*, 82 N. Y. 575, and *In re Manning*, 139 N. Y. 446, 34 N. E. 931; the court quoting from the last-mentioned case as follows: "The demands of actual practical litigation are too pressing to permit the examination or discussion of academic questions, such as this case, in its present situation, presents."

We concur: Haynes, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the appeal herein is dismissed.

MALONE v. JOHNSON.

S. F. No. 577; January 23, 1897.

47 Pac. 579.

Pleadings—Amendment—Changing Cause of Action.—A complaint alleged that on April 1, 1891, defendant gave his note to plaintiff, and to secure payment thereof delivered a stock certificate which he had assigned to plaintiff on March 31, 1887. The prayer was for sale of the stock to apply on the overdue note, and for a personal judgment for any deficiency. An amended complaint alleged that on March 31, 1897, defendant gave his note to plaintiff, and delivered said certificate as security, and that on April 1, 1891, a new note was given in place of the old one, and the certificate redelivered to plaintiff as security for the new note. The prayer was the same, except

that plaintiff waived judgment for deficiency. Held, that the amendment did not set up a different cause of action.

A Pledge of Corporate Stock by Indorsement and Delivery of the certificate is valid as between the parties.

APPEAL from Superior Court, Del Norte County; James E. Murphy, Judge.

Action by John Malone against James K. Johnson. A demurrer to the amended complaint was sustained and plaintiff appeals. Reversed.

L. F. Cooper and Sawyer & Burnett for appellant; A. J. Bledsoe for respondent.

BRITT, C.—In this cause judgment final for defendant was rendered on demurrer to an amended complaint. To support the judgment on appeal respondent relies on the plea of the statute of limitations (Code Civ. Proc., sec. 337) contained in the demurrer. March 30, 1896, plaintiff filed his original complaint, alleging that on April 1, 1891, defendant executed his promissory note in plaintiff's favor for the sum of \$2,405, payable twelve months after date, and to secure such payment delivered to plaintiff a certificate of shares of stock in a certain corporation, which certificate had been previously, to wit, on March 31, 1887, assigned to plaintiff by defendant; and that the note remains unpaid. The prayer was for sale of the stock, application of the proceeds to payment of the debt, personal judgment for any deficiency, etc. In the amended complaint, filed April 20, 1896, it was shown that on March 31, 1887, defendant made his promissory note to plaintiff for the sum of \$1,615.36, payable in one year, and as security for payment thereof then delivered to plaintiff the aforesaid stock certificate duly indorsed by defendant; that at the same time (March 31, 1887) an instrument in writing was executed by the parties stating the terms of the hypothecation of the stock; that such note was not paid, and on April 1, 1891, the principal and interest thereof amounted to \$2,390.73. That defendant then owed plaintiff a further sum of \$14.27, and in consideration thereof, and of the surrender of the overdue note, he executed a new note for the aggregate of said debts, \$2,405; "that the said defendant, James K. Johnson, to secure payment of said last-

mentioned promissory note, . . . did, on said first day of April, 1891, redeliver to said plaintiff, John Malone, said certificate of stock, . . . and did then and there agree with plaintiff that he, plaintiff, should hold the same in the same manner and effect to secure the payment of the last-described promissory note of \$2,405, as he had held the same to secure payment of the first-described promissory note of \$1,615.36." Nonpayment of the new note was then stated, and the prayer was similar to that of the original complaint, except that plaintiff waived judgment for deficiency.

Respondent argues that the amended complaint, filed more than four years after maturity of the note of April 1, 1891, alleged a cause of action different from that set up in the original pleading, and hence does not have relation to the time of filing such original so as to save the bar of the statute. The pleader seems to have deemed it prudent to state in his amended complaint the antecedents of the debt evidenced by the new note and the transaction by which it was secured. This was not an attempt to state a different cause of action. The contract of April 1, 1891, which superseded that of March 31, 1887, was the ground of the claim made against defendant in both complaints: *Anderson v. Mayers*, 50 Cal. 525. It is further claimed that an extension of the lien on the stock could only be effected by another written agreement for that purpose; that none is alleged, and hence, as we understand the inference which respondent seeks to enforce, the right to proceed against the security is lost by lapse of time. But it appears that the certificate, already indorsed by defendant, was redelivered to plaintiff with the new note as security for its payment. As between the parties, nothing more was essential to a valid pledge of the stock. A second manual delivery was unnecessary, indeed, to perpetuate the lien if plaintiff still held possession of the certificate at the time the new note was executed: *California Nat. Bank v. Ginty*, 108 Cal. 148, 153, 41 Pac. 38; *Brown v. Warren*, 43 N. H. 430. See *Spreckels v. Bank*, 113 Cal. 272, 54 Am. St. Rep. 348, 33 L. R. A. 459, 45 Pac. 329, 331. The judgment should be reversed and the court below directed to overrule the demurrer to the amended complaint.

We concur: Haynes, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is reversed and the court below is directed to overrule the demurrer to the amended complaint.

MEEKER v. SHUSTER et al.

S. F. No. 374; January 23, 1897.

47 Pac. 580.

Ejectment.—A Grantee of a Deed Absolute on Its Face cannot Maintain ejectment thereon, where his grantor merely held the title as security for a debt which the grantee paid, and at the same time executed a bond to the original mortgagor in which he agreed to convey if the amount expended by him was repaid, with interest, by a specified time, since the instrument was a mortgage.¹

APPEAL from Superior Court, Sonoma County; S. K. Dougherty, Judge.

Ejectment by M. C. Meeker against Sarah E. Shuster and others. From a judgment in favor of defendants and from an order denying a motion for a new trial plaintiff appeals. Affirmed.

Thos. Rutledge for appellant; C. S. Farquar and T. J. Butts for respondents.

HAYNES, C.—This is an action of ejectment brought by the plaintiff to recover possession of certain lands in Sonoma county of which, it is alleged, he is the owner in fee and entitled to possession. Judgment was entered for the defendants upon the findings, and plaintiff appeals therefrom and from an order denying his motion for a new trial.

John Shuster, the husband of Sarah E., and father of the other defendants (James E. and Jacob F. Shuster), died seised of the demanded premises in July, 1883. On June 1,

¹ Cited in Meeker v. Schuster, 4 Cal. App. 297, 87 Pac. 1103, a foreclosure suit between the same parties, in which the judgment-roll of the former case was held to be res judicata as to an instrument, in form a deed, being actually a mortgage—the mortgage sought to be foreclosed.

1879, said John Shuster executed to Aaron Barnes his promissory note for \$5,482.89, with interest, and a mortgage upon said premises to secure the same. On September 29, 1883, the claim of said Barnes upon said note and mortgage was allowed by the administrator of the estate of said John Shuster in the sum of \$7,282.40. Said lands were inventoried at \$8,000, and the personal property at \$961.50, and a sale of said lands was ordered by the court to pay the debts of the estate. The defendants, the widow and two of the sons, desired to purchase the land, and applied to Barnes, the mortgagee, for assistance, and he consented to aid them in making the purchase. By arrangement with her said sons, the widow bid in the property at \$11,000, each of the defendants putting in the amount of their several interests, and receipted to the administrator therefor, and Barnes also receipted for the amount of his mortgage claim, and made some other advances; and the administrator, with the assent of the sons who were interested in the purchase, conveyed the land to the widow, who, with her said sons, was then, and ever since has been, in possession. Said conveyance was made December 3, 1883, and on the same day the widow conveyed the same land to said Barnes by a deed absolute on its face, and at the same time Barnes executed to the defendants a bond, whereby he agreed to convey to them the same lands on or before December 3, 1893, upon payment of \$11,000, with interest at the rate of nine per centum per annum, the taxes on said premises to be paid equally by the first and second parties until one-half of the principal sum and interest should be paid, and after that the whole of the taxes were to be paid by the widow and her sons. On October 5, 1892, pursuant to an arrangement between the plaintiff and the defendants in this action—the character and purpose of which is the principal question presented on this appeal—Meeker paid to Barnes the amount then due him from the defendants, the said bond executed by Barnes was canceled, and Barnes executed and delivered to Meeker a grant, bargain and sale deed for the said premises, and Meeker executed to the defendants a bond by which he agreed to convey the same premises to the defendants, upon payment, on or before October 5, 1902, of the sum of \$8,440, Meeker to pay all taxes, and the defendants to pay interest at the rate of eight per centum per annum, payable semi-annually, and

if not so paid to be compounded. It was further agreed that Meeker would "accept payments in part or in full on this bond at any time before maturity, and to make deed when the full amount is paid." This action was commenced May 28, 1894, and was preceded by a demand that defendants remove from the premises and deliver possession to plaintiff's agent. The evidence shows that defendants were in arrears in the payment of interest, but no reference is made to that fact, either in the demand for possession, or in the complaint, which is in the usual form in ejectment, alleging that the plaintiff is seised in fee and entitled to possession. The complaint was not verified, and the answer is a general denial.

The court found, from evidence entirely satisfactory to us, that the transaction between Barnes and the defendants was a loan, for which the deed was taken as a security; that the amount mentioned in the bond given by the plaintiff was the amount then due from the defendants to Barnes; that said sum was loaned by the plaintiff to the defendants to enable them to cancel their indebtedness to Barnes; that plaintiff, at the time said instrument was executed by Barnes to him, and which purported to be an absolute conveyance, knew the character of the interest Barnes had in said land; that the instrument executed by Barnes to him was not intended to pass the title to him; and that plaintiff is not the owner or entitled to the possession of the demanded premises. The findings are very full and minute, several of them being of probative facts merely, but the ultimate facts are also fully found. Many of the specifications of alleged insufficiency of the evidence go to the findings of probative facts relating to the settlement of the estate of John Shuster, deceased, the amounts due Barnes, and other facts of like character; but, concerning these, it need only be said that the amount due Barnes from the defendants was mutually agreed upon and paid, and that sum constitutes the basis of the transaction between plaintiff and defendants which is involved in this action, and the sole question is whether the plaintiff bought and paid for the land, and acquired the title thereto, and then sold it to defendants, or whether the amount he paid Barnes was a loan to defendants, and the deed and bond in effect a mortgage to secure it.

That the deed to Barnes was given and received as a security for money loaned is beyond question. His advance-

ments, including the amount due on the mortgage given him by John Shuster in his lifetime, were for the express purpose of enabling the defendants to purchase the land in question. He testified that he took the deed, instead of a mortgage, for the reason that he supposed the taxes would be less upon the land than upon the mortgage, and that he would be saved the expense of a foreclosure in case he was not repaid; and, in reply to the following question put by the court, namely, "When you entered into this transaction with the Shusters did you think you were buying the land, or did you think you were loaning money?" he said, "Well, I thought I was loaning money." Touching the transaction with the plaintiff, Mrs. Shuster and her son Jacob testified to a conversation with the plaintiff some five or six months prior to the execution of the deed from Barnes, and the plaintiff, in rebuttal, testified that in that conversation Mrs. Shuster asked him to buy the property, and he replied that he "didn't want the property"; that Mrs. Shuster wanted to give a mortgage, and in reply to that proposition we quote the following from his testimony: "I told her I didn't want to take a mortgage; that if they failed to pay the interest I had to foreclose; that it was more than the property was worth. Then Mrs. Shuster said she would take the deed from Mr. Barnes, and deed to me, and I would give her a bond to purchase the property. I told them that was nothing but a mortgage, or the same thing as a mortgage." The witness then proceeded to explain the matter of taxes, and continued as follows: "I then explained to all present that, if they were to take the deed from Mr. Barnes, the title would be vested in them. Then they would deed to me, and I would give them a bond. The supreme court had said that it was a mortgage. I then asked the question how much money they required. They talked the matter over pro and con, and they thought they needed about \$8,440." The plaintiff further testified: "The papers were signed, and we said we would go to the bank, and I would pay Mr. Barnes. We then all went to the recorder's office, and the Shusters and Barnes canceled the bond. I then filed my deed for record and the Shusters filed the bond for record. As we came out Jacob Shuster made the statement that Hitchcock had said he would give them \$12,000 for the place any day. I remarked: 'Well, you ought to get \$13,000 or \$14,000 for

the property.' I did not say they ought to sell for less than that."

From the testimony of the plaintiff it is perfectly clear that the transaction between him and the defendants was a loan upon security, and not a purchase by the plaintiff. He had refused to buy. The money paid by plaintiff was the precise amount due from defendants to Barnes. He informed defendants that the deed and bond was a mortgage, and had so been held by the supreme court, the difference being that the taxes would be less upon the land than upon the mortgage, and that a foreclosure would not be necessary. As to the facts involved, and the purpose of the transaction, there can be no question. That plaintiff was mistaken as to the legal effect does not change the rights of the parties. That a deed, absolute upon its face, when given as security for a debt, or for money loaned, is a mortgage, and not a transfer of the legal title, is too well settled in this state to require citation of authorities. It was a loan of \$8,440 payable in ten years, with the privilege of payment of the whole or any part of it, at any time before maturity, with interest at the rate specified, to be paid semi-annually, or to be compounded. But, if the transaction amounted to a sale to the plaintiff and a resale to the defendants, this action could not be sustained, since there was no provision in the bond that it should be forfeited for the nonpayment of interest, and no part of the purchase money was due.

We are referred by appellant to *Mahoney v. Bostwick*, 96 Cal. 58, 31 Am. St. Rep. 175, 30 Pac. 1020, *Penney v. Simmons*, 99 Cal. 382, 33 Pac. 1121, and many other cases, to the proposition that "the testimony must be so clear and convincing that both parties intended it as a mortgage as to leave in the mind of the trial court no doubt as to the intention of the parties; otherwise, the writing should prevail." In the first of the cases above cited it was said: "But whether the evidence is of such character and strength as to produce conviction is a question for the trial court to determine." And this is repeated in almost the same words in the second of said cases. But in this case, if we were required to be satisfied, from a review of the evidence, that the court below rightly determined the character of the transaction before we could affirm the judgment, we could not hesitate to affirm it. Section 2924 of the Civil Code provides: "Every transfer of

an interest in property other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage, except when in case of personal property it is accompanied by actual change of possession, in which case it is deemed a pledge": See, also, *Montgomery v. Spect*, 55 Cal. 352. If the transfer created a trust, as contended by appellant, it would not aid him, since in that case the terms of the trust were evidenced by the bond, and the trustee of the title could not claim the possession until the bond should be forfeited or canceled by the defendants. It was not a trust, however, in the sense of the statute, but a mortgage. The findings are justified by the evidence, and the conclusions of law were correctly drawn therefrom. The judgment and order appealed from should be affirmed.

We concur: Searls, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

PALMER v. BURNHAM.*

S. F. No. 475; January 23, 1897.

47 Pac. 599.

Contract for Street Work—Fixing Time for Completion.—Under Statutes of 1885, page 151, section 6, which authorizes a superintendent of streets to enter into a written contract for grading or other street work, and requires him to fix the time for the commencement and for the completion of the work under all contracts, a fixing of the time for the commencement of work under a contract at "within fifteen days from the date thereof," and for its completion at one hundred and eighty days "thereafter," makes the time for the completion dependent on the time of actual commencement, and is not such a compliance with the statute as entitles the contractor to enforce assessments for the work.

APPEAL from Superior Court, Alameda County; John Ellsworth, Judge.

Action by C. T. H. Palmer, as assignee of C. A. Warren, against Helen M. Burnham and others, to enforce a lien for

*For subsequent opinion in bank, see 120 Cal. 364, 52 Pac. 664, 1060.

an assessment for street work under a contract for grading in the city of Oakland. Judgment for defendant on demurrer to the complaint and plaintiff appeals. Affirmed.

C. T. H. Palmer in pro. per.; J. C. Bates for respondent.

SEARLS, C.—Action to recover by C. T. H. Palmer, as assignee of C. A. Warren, contractor, upon a street assessment, and to enforce a lien therefor for grading Broadway, a public street in the city of Oakland. A demurrer was interposed by the defendants to the amended complaint of the plaintiff, which was sustained by the court, and, plaintiff having failed and declined to amend, final judgment went for the defendants. Plaintiff appeals from the judgment, and the cause comes up on the judgment-roll.

The only questions presented relate to the sufficiency of the amended complaint. The resolution of intention to grade "to the official subgrade for macadamizing," etc., Broadway, from the northern line of Fourteenth street to the northern boundary line of the city of Oakland, was adopted March 18, 1889, and such proceedings were thereafter had that the work was completed prior to June 24, 1890. The improvement was therefore performed under "An act to provide for work upon streets, lanes," etc., approved March 18, 1885 (Stats. 1885, p. 147), and the act amendatory thereof, approved March 14, 1889 (Stats. 1889, p. 157). The contract under which the grading was performed was dated August 2, 1889, and the pleader, after averring that the superintendent of streets entered into the same with C. A. Warren, the contractor, continues and avers that he (the superintendent) "fixed the time for beginning said work to be within fifteen days from the date thereof, and the time for completing said work to be within one hundred and eighty days thereafter." It is also alleged that the work was commenced August 16, 1889, and "under direction of said council by its resolutions Nos. 14,667, 14,853, and 15,062, said superintendent of streets enlarged and extended the time of completing said work, viz., February 4, A. D. 1890, by ninety days, and April 22, 1890, by forty days, and June 17, 1890, by thirty days." It is further averred that the work was completed according to the "terms of the contract with its said extensions of time."

Section 6 of the act of 1885 (Stats. 1885, p. 151) confers power upon the superintendent of streets to enter into written

contracts of the character herein involved, and provides that "he shall fix the time for the commencement, which shall not be more than fifteen days from the date of the contract, and for the completion of the work under all contracts entered into by him, . . . and he may extend the time so fixed from time to time, under direction of the city council." It has been repeatedly held by this court that all extensions of time for the completion of contracts for street work must be made before the period fixed therein for its completion, or within the periods to which it has been previously extended: *Beveridge v. Livingstone*, 54 Cal. 56, 57; *Fanning v. Schammel*, 68 Cal. 429, 9 Pac. 427; *Dougherty v. Coffin*, 69 Cal. 454, 10 Pac. 672; *Raisch v. San Francisco*, 80 Cal. 1, 22 Pac. 22; *McVerry v. Boyd*, 89 Cal. 304, 26 Pac. 885; *Brock v. Luning*, 89 Cal. 316, 26 Pac. 972; *Brady v. Burke*, 90 Cal. 1, 27 Pac. 52; *Heft v. Payne*, 97 Cal. 108, 31 Pac. 844. If the one hundred and eighty days fixed in the contract are to be reckoned from August 2, 1889, the date of the contract, then the time expired January 29, 1890; and, as it could not be thereafter extended, the attempt to do so on the 4th of February, 1890, was a vain act under the foregoing authorities, and could not galvanize the contract into new life.

Appellant's contention is that the expression in the pleading, that "the time for completing said work to be within one hundred and eighty days thereafter," must be construed to mean one hundred and eighty days from the date of its commencement, which, as before stated, was August 16, 1889, and from which time one hundred and eighty days would extend beyond the date of the first extension. *People v. Los Angeles Electric Ry. Co.*, 91 Cal. 341, 27 Pac. 673, is relied upon in support of this construction. This construction, however, leaves the contract subject to another grave objection, in that it leaves the time of the completion of the contract indefinite. The statute requires the superintendent of streets to fix the time for the commencement and for the completion of the work. This authority is conferred upon and is to be exercised by him, and, until it is done, the contract, as has been said, is inchoate or remains in abeyance. To fix the running of a precise period of time from the happening of an uncertain event is to leave it indefinite. It is not left to the contractor to fix the time within which his contract may be completed, yet in the present case, as he had fifteen days after

the date of the contract within which to commence the work, he might, under the theory of appellant, determine within fifteen days when it should be completed. It seems to have been the intention of the lawmakers to require record evidence of the various steps taken in consummating street improvements, to the end that parties interested may have certain knowledge as to the regularity of proceedings whereby their property is encumbered by the liens created thereby. To say that the validity of a given improvement is to be determined by the time at which the work thereon is commenced, when such work is within certain limits optional with the contractor, and for the determination of which only oral proof can be had, is to leave the validity of such proceedings open to doubt and uncertainty, and must, we think, lead to unhappy results. It is sufficient to say that where the statute, as here, requires the superintendent of streets to fix the time for the completion of the work, he must do so by such designation as will render it certain or capable of being made certain of computation, and that to establish, as the initial point from which the time is to run, an event which is uncertain, and to a certain extent in the volition of another, renders the time uncertain and void under the statute. These views render the consideration of the other points raised on the demurrer unnecessary. We recommend that the judgment be affirmed.

We concur: Haynes, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

BANCROFT v. SAN FRANCISCO TOOL CO.*

S. F. No. 484; January 27, 1897.

47 Pac. 684.

Contract to Make Passenger Elevator.—A Warranty in a Written contract to manufacture and put up a passenger elevator, that the contractor would furnish first-class work, and keep the elevator

*For subsequent opinion in bank, see 120 Cal. 228, 52 Pac. 496.

in repair for one year, does not include a warranty that the design submitted with the specifications would be suitable.

Contract to Make Passenger Elevator.—The Implied Warranty created by Civil Code, section 1770, which provides that one who manufactures an article under an order for a particular purpose warrants that it is reasonably fit for such purpose, forms a part of a written contract to manufacture and put up a passenger elevator, so that an action for breach thereof is one on a written contract (Code Civ. Proc., sec. 337), for breach of which action may be brought within four years.

Contract to Make Passenger Elevator.—A Cause of Action for a Breach of warranty that the design of a passenger elevator would be suitable for the purpose for which it was intended accrues when the elevator is completed.

APPEAL from Superior Court, City and County of San Francisco; Charles W. Slack, Judge.

Action by H. H. Bancroft against the San Francisco Tool Company. There was a judgment for defendant for costs, and from an order denying a new trial plaintiff appeals.

Galpin & Zeigler for appellant; E. J. Pringle for respondent.

SEARLS, C.—This is an action to recover damages from the corporation defendant, alleged to have been sustained by plaintiff by reason of the fall of a passenger elevator erected by said defendant for plaintiff in the History Building, Market street, San Francisco. Defendant, among other defenses to the action, set up the bar of the statute of limitations as found in subdivision 1 of section 339 of the Code of Civil Procedure, which provides that "an action upon a contract, obligation or liability, not founded on instrument in writing, or founded upon an instrument of writing executed out of this state," shall be brought within two years. At the trial, and upon the close of plaintiff's testimony, defendant moved the court for a nonsuit, which motion was granted, and judgment entered in favor of defendant for costs. This appeal is from an order of the court denying a motion on behalf of plaintiff for a new trial.

Whether or not plaintiff's cause of action is barred by the statute of limitations is the only question necessary to be considered on this appeal. Some minor questions were made

at the trial, none of which, however, have any bearing upon the main point, viz., the bar of the statute; and, manifestly, if the cause of action was barred, the nonsuit was properly granted, while, if not so barred, the nonsuit was clearly erroneous, and a new trial should have been granted. It appears from the record that early in 1887 the plaintiff was engaged in the construction of what is known as the "History Building," on Market street, San Francisco—a building consisting of five stories and a basement; that he required three elevators therein, viz., two freight and one passenger elevator. On the fourth day of April, 1887, the defendant corporation submitted to plaintiff a proposition in writing, which is in part as follows:

"San Francisco, April 4, 1887.

"A. L. Bancroft & Co., City:

"We will furnish three hydraulic elevators as follows, and as per plan submitted with this specification.

"Elevators: Three hydraulic cylinders complete, with elevating sheaves mounted on same as shown on plan.

"Details of erection: 1,300 feet of $\frac{5}{8}$ -inch wire rope."

Then follows a long list of materials to be furnished, consisting of iron sheaves, shafting, counterweights, water-gates, casing, elbows, cast-iron tees, flanges, sewer-pipe, steam pump, tank, cages, "one cage to be made for carrying passengers," etc., which need not be mentioned in greater detail. The offer proceeds as follows: "We will furnish the work heretofore mentioned in a first-class, workmanlike manner for the sum of five thousand dollars (\$5,000), guaranteeing these elevators for one year; that is to say, we will keep them in first-class order for one year, free of charge to you. Payments to be made as follows: On completion of the two freight elevators we to receive two thousand dollars, and on the completion of passenger elevator we to receive fifteen hundred dollars, and after thirty days' satisfactory running we to receive balance due on contract." The proposition was accepted by plaintiff on or before April 6, 1887, except that by mutual agreement the payments were to be made in monthly sums of \$500 each, the first payment of \$500 being made by plaintiff on said April 6, 1887. The elevators were constructed by defendant, and the final payment on account thereof was made February 15, 1888. It is not quite clear from the testimony when the elevators were completed.

Plaintiff, in his amended complaint avers that in February, 1888, all of said elevators had been erected in said building, except that various parts thereof were, as plaintiff is informed and believes, altered by the defendant from time to time, and were not in good running order down to August, 1888, and "that in said month said plaintiff accepted said elevators." Defendant, in his answer to the amended complaint, avers that the elevators were completed July 1, 1887, and kept by it in first-class order until July 1, 1888. Plaintiff, in his testimony, admits that the passenger elevator started to run about July, 1887, but says it would run a while and then stop for repairs and alterations, etc. It ran that way, he says, for two or three months, one of his (plaintiff's) employees running it. We may assume, for the purposes of the case, that it was finally accepted by plaintiff in August, 1888, as stated in the complaint. The passenger elevator fell September 19, 1888, causing the damage complained of. This action was commenced September 18, 1890, more than two years after the work was accepted, and within two years after the injury occasioned by the fall of the elevator. The testimony tended to show that the drum over which the cables ran was fifteen inches in diameter, and the wire cable running over it was five-eighths of an inch in diameter; that, in order to be safe, the drum should be at least sixty times the diameter of the cable, or, in the present instance, should be thirty-seven and one-half inches in diameter, etc. We may, for the sake of brevity, discard all scientific terms, and say the evidence tended to show a faulty design in the machinery, and that by reason thereof, and not in consequence of bad workmanship, the cable or cables were overtaxed. That the wire ropes should not have been taxed over one-sixth of their breaking resistance, the coefficient of safety in a passenger elevator being six, while in the present instance it was only about two; and that, by reason of being overtaxed, the cables soon gave out, and the accident occurred.

1. The only language used in the proposition or offer of the defendant which is or can be construed into a warranty is hereinbefore set out, and we repeat it: "We will furnish the work heretofore mentioned in a first-class, workmanlike manner for the sum of \$5,000, guaranteeing these elevators for one year; that is to say, we will keep them in

first-class order for one year free of charge to you." This language only exhibits an intent to warrant the character or quality of the work to be performed upon the elevator, and cannot, by any fair canon of interpretation, be extended so as to include the suitability of the design. The plan or design of the elevators was submitted with the specifications. The offer was to "furnish three hydraulic elevators as follows, and as per plan submitted within this specification." According to this plan, the materials were to be furnished and the work performed "in a first-class, workmanlike manner." There is no warranty of the plan or design in the language used. As was said by the court below in granting the nonsuit: "First-class materials and workmanship may be furnished on a poor design or device, as well as on a good one." No particular form of words is necessary to constitute an express warranty. If it appears from the language used that an intent to warrant exists, and is relied upon, it is sufficient. Indeed, some of the authorities go so far as to hold that the positive affirmation of a material fact by the vendor, which is relied upon by the vendee, will be treated as a warranty, regardless of the actual intent of the vendor. This last position is, however, not supported by the weight of authority. Where, as in the present instance, the contract is in writing, we cannot go beyond the instrument to formulate an express warranty, since the written instrument is conclusively supposed to embody the whole contract: *Lamb v. Crafts*, 12 Met. (Mass.) 353; *Reed v. Wood*, 9 Vt. 286; *Boardman v. Spooner*, 13 Allen (Mass.), 353, 90 Am. Dec. 196; *Dean v. Mason*, 4 Conn. 432, 10 Am. Dec. 162; *Benjamin on Sales*, 6th ed., p. 625, and cases there cited; *Johnson v. Powers*, 65 Cal. 179, 3 Pac. 625. As the contract contains no language importing a warranty of the plan or design of the passenger elevator, and as the evidence shows that it was such design that was faulty, and caused the injury to plaintiff, defendant was not liable as and for an express warranty.

2. Independent of express contractual specifications, the law implies certain warranties in given cases. In this state a contract of sale or agreement to sell does not imply a warranty, except as provided in the Civil Code (section 1764). Section 1770 of the same code is as follows: "One who manufactures an article under an order for a particular purpose

warrants by the sale that it is reasonably fit for that purpose." This section applies to the case in hand, and the only question involved is this: Does the implied warranty of the statute become a part of the written contract, so as to enable plaintiff to maintain an action for a breach thereof within four years, or does it constitute an obligation or liability, not founded upon an instrument in writing, upon which an action must be brought within two years, as provided by subdivision 1 of section 339 of the Code of Civil Procedure? The contention of appellant is "that the warranty implied by law, that the elevator was reasonably fit for the purpose of carrying passengers, is a part of the written contract," and hence, of course, that the limitation of four years applies, as in case of written contracts. In other words, the contention is that what is by the law implied in an express contract is as much a part of it as what is expressed. Implied warranties are created by law, or spring from the facts existing at the time of sale. We think this contention is founded upon a firm basis. "What is implied in a contract is as much a part of it as what is expressed": 1 Beach on Modern Contracts, sec. 710; Jones v. Turner, 80 Hun, 157, 30 N. Y. Supp. 65. Thus, A contracts for the sale of goods to B, and no time is provided for delivery. The law adds that delivery must be made within a reasonable time. To put it in the form of a syllogism as in pleading, the law becomes the major premise, the contract the minor premise, and from these the conclusion flows. Thus, one who manufactures an article under an order for a particular purpose warrants by the sale that it is reasonably fit for that purpose. The defendant manufactured for plaintiff, under an agreement in writing, an elevator, to be used in the conduct of passengers, which was not reasonably fit for that purpose. The conclusion is that there was a breach of the warranty for which defendant is liable. The law did not make a new or separate contract between the parties, but attached the legal obligation of a warranty to that which they made. The obligation attaches to and becomes an integral part of the contract, which is discharged upon the fulfillment of the latter, and which exists in all its rigor upon a breach of such a contract, and is only barred by time upon the expiration of the four years prescribed by section 337 of the Code of Civil Procedure, as the limita-

tion for commencing actions on contracts in writing. The breach of the warranty is based upon the erroneous design of the passenger elevator, and such breach occurred when the elevator was completed: *Wood on Limitations*, p. 394; *Lattin v. Gillette*, 95 Cal. 317, 29 Am. St. Rep. 115, 30 Pac. 545, and cases there cited; *Byrum v. Agricultural Works*, 91 Cal. 657, 27 Pac. 1093. In case of the warranty of title of personal property sold the rule is different. There there is no breach until the possession of the purchaser is disturbed by the true owner: *Gross v. Kierski*, 41 Cal. 111. As four years had not elapsed between the completion of the contract and the date of suit brought, the cause was not barred, and we recommend that the order of the court below denying plaintiff's motion for a new trial be reversed and a new trial ordered.

We concur: Britt, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order of the court below denying plaintiff's motion for a new trial is reversed and a new trial ordered.

MATTHEWS v. BULL.

S. F. No. 504; February 1, 1897.

47 Pac. 773.

Contributory Negligence—Pleading and Proof.—In an action for personal injuries, plaintiff need not allege that he was not negligent.¹

Appeal—Conflicting Evidence.—A verdict will not be disturbed where the evidence is conflicting.

Fellow-servants—Retaining Incompetent Employee in Service. Under Civil Code, section 1971, providing that "an employer must in all cases indemnify his employee for losses caused by the former's want of ordinary care," the employer is responsible for an injury

¹ Cited in the note in 33 L. R. A., N. S., 1205, on burden of proof as to contributory negligence.

caused to one employee by the negligence of another, whom he has retained with knowledge of his incompetence.²

Employer's Liability—Selection of Employees—Delegation.—A master cannot divest himself of responsibility for the selection and retention of competent servants by delegating the duty to another.

Employer's Liability Where Foreman Gives Signal.—Where an employee is injured by the dropping of a hammer of a pile-driver, at a signal by the foreman, before he was signaled by the employee putting a ring on the pile, the employer is liable if the foreman negligently gave the signal.

APPEAL from Superior Court, Humboldt County; G. W. Hunter, Judge.

Action by William H. Matthews against John C. Bull, Jr. From a judgment in favor of plaintiff and an order refusing a new trial defendant appeals. Affirmed.

S. M. Bock and F. A. Cutler for appellant; L. F. Porter and J. N. Gillett for respondent.

BELCHER, C.—This is an action to recover damages for an injury sustained by the plaintiff while he was in the employ of the defendant. By the verdict and judgment plaintiff was awarded damages in the sum of \$1,500; from which judgment and an order refusing a new trial the defendant has appealed.

In 1895 the defendant was engaged in constructing jetties at the entrance to Humboldt bay. A portion of the work to be done was the driving of piles. R. T. Stone was the superintendent of the work on the south jetty, with authority to hire and discharge all the men employed on that jetty. In April he hired the plaintiff as a common laborer, and also hired Robert Astleford to act as foreman of the pile-driver crew. Plaintiff commenced at once, and thereafter continued to perform the work assigned to him, until May 7th, when he was injured. Astleford commenced

² Cited with approval in *Coulter v. Union Laundry Co.*, 34 Mont. 603, 606, 87 Pac. 976, 977, which, on this authority, construes the California statute, as likewise a similar statute of Montana, as recognizing the doctrine of assumption of known risk as applicable in cases of the contemplated want of ordinary care. But see the views of a dissenting judge on the next page of the Montana case.

at once to act as foreman of the crew, and continued to so act until May 15th, when he was discharged. On May 7th, a large pile having been put in place to be driven, Astleford directed the plaintiff to go up the driver and put a ring on the top of the pile. Plaintiff thereupon climbed up the ladder to the third staging, about twenty-four feet above the base, and then pulled the ring up by a rope attached to it. The ring was about sixteen inches in diameter, and weighed from forty to forty-five pounds. Astleford was standing at the foot of the driver, close up to the pile, where he could not see the plaintiff, and from that point he hallooed to the plaintiff to put on the ring. Plaintiff started to put the ring on the pile, was just shoving it over with his right hand, when Astleford, having waited only from a quarter to a half of a minute after hallooing, signaled to the engineer to let the hammer fall, and he did so. The hammer struck on plaintiff's hand, and crushed it so that it had to be amputated, and this is the injury complained of. It was the custom, when a man went aloft to put the ring on a pile, for him, as soon as he had it in place, to signal to the foreman, and he then signaled to the engineer to let the hammer fall. But on this occasion the plaintiff, as he testified, gave no signal whatever. And if Astleford had stepped aside a few feet, to the place where he usually stood when such work was being done, he could have seen the plaintiff, and seen when the ring was in place. It is alleged in the complaint that Astleford was the foreman of the pile-driver crew of which plaintiff was a member; that the work of constructing said jetty was of a dangerous character, and required skill, prudence, knowledge and carefulness on the part of those in charge thereof, and that it was the duty of defendant to provide men possessing all these qualifications; that the said Astleford, by reason of his habitual carelessness and negligence, was incompetent to have charge of such work, of which fact defendant had due notice; that he was constantly exposing those under him to unnecessary dangers and risks, which fact defendant well knew, having almost daily notice thereof; that the defendant, well knowing said Astleford to be an incompetent, careless and negligent man in the work in which he was employed, carelessly and negligently retained him in such employment as foreman of said crew;

and that the said Astleford, on the seventh day of May, 1895, carelessly and negligently caused the hammer of the pile-driver to drop upon plaintiff's right hand, crushing and bruising it to such an extent that it had to be amputated. The answer denies all the averments of the complaint as to carelessness and incompetency of Astleford, and alleges that the injury to plaintiff was wholly caused by his own fault and carelessness, and was not caused by any carelessness or negligence of said Astleford.

1. The first point made for a reversal is that the complaint was fatally defective because it contained no allegation that plaintiff did not know of the incompetency of Astleford. This point cannot be sustained. In this state the law seems to be settled that in this class of cases it is not necessary to allege in the complaint that the injury was done without fault or negligence on the part of the plaintiff. When such a defense is relied upon, the burden is on the defendant to establish it: *Robinson v. Railroad Co.*, 48 Cal. 409; *Magee v. Railroad Co.*, 78 Cal. 430, 12 Am. St. Rep. 69, 21 Pac. 114; *Smith v. Steamship Co.*, 99 Cal. 462, 34 Pac. 84.

2. Under the issues raised by the pleadings, the principal questions to be determined were: (1) Was Robert Astleford a careless and negligent man, constantly exposing those under him to danger? (2) Did defendant have knowledge of Astleford's carelessness, and, having such knowledge, retain him in his employ? (3) Was the injury sustained by plaintiff caused by Astleford's carelessness or negligence? (4) Was the injury sustained by plaintiff caused by his own carelessness or negligence? These were all questions of fact for the jury, and were answered, as shown by the verdict, in favor of the plaintiff. Appellant contends that the evidence was insufficient to justify the verdict, but in our opinion this contention cannot be sustained. The evidence in the case covers more than one hundred pages of the printed transcript, and is largely quoted by counsel in their briefs. But to set it out, even in substance, would extend this opinion to great length, and subserve no useful purpose. It is true that in many respects the evidence is squarely conflicting, and some of it must have been untrue; but what part of it was true and what false was a matter for the jury to determine, and the

settled rule in such cases, that the verdict will not be disturbed for want of evidence to justify it, must be followed.

3. The duties which an employer owes to his employees are said to be "to furnish suitable machinery and appliances by which the service is to be performed, and to keep them in repair and order; to exercise ordinary care in the selection and retention of sufficient and competent servants to properly conduct the business in which the servant is employed, and to make such provisions for the safety of employees as will reasonably protect them against the dangers incident to their employment. The performance of these duties cannot be shifted by it to a servant, so as to avoid responsibility for injury caused to another servant by its omission; nor is their negligent performance one of the ordinary risks of the service impliedly assumed by the employee by his contract of employment": *Daves v. Pacific Co.*, 98 Cal. 19, 35 Am. St. Rep. 133, 32 Pac. 708. The Civil Code provides that "an employer must in all cases indemnify his employee for losses caused by the former's want of ordinary care": Sec. 1971. And, speaking of this section, the court, in *Gier v. Railway Co.*, 108 Cal. 133, 41 Pac. 23, said: "Such lack of ordinary care as may well be shown by the retention of an unfit employee after knowledge of the fact, as by a failure to use due diligence at the time of his selection, and in either case the liability of the employer attaches." And see 7 *American and English Encyclopedia of Law*, page 848, where the general rule upon the subject is stated as follows: "Although an employer may have used due care and diligence in selecting his servants, if subsequently he obtains knowledge of a servant's incompetence or unfitness for his position, and retains him in his employment, he is liable to a fellow-servant for any injury resulting from such unfitness," except in cases where the injured servant "knew of such incompetence, and made no complaint about it to his employer." Under the law as thus declared, and the facts as found by the jury, the plaintiff was clearly entitled to recover damages for his injuries.

4. Appellant claims that the court committed numerous errors of law in the admission and rejection of evidence. But, without taking time to discuss the several rulings complained of separately, we deem it enough to say that they all seem to have been authorized and proper; and, at any

rate, we can see in them no such prejudicial error as would call for and justify a reversal of the judgment.

5. Appellant complains of some of the instructions given by the court to the jury, and particularly of the first one, which reads as follows: "I charge you, as law, that it is the duty of a master to exercise ordinary care in the selection and retention of sufficient and competent servants to properly conduct the business in which the servant is employed. And, in this connection, I further charge you that the master cannot divest himself of liability by intrusting the performance of this duty to any other person. This duty the law imposes upon the master personally, for the safety and protection of his servants. If, therefore, the master delegates this duty to any other person, no matter what his rank may be, the person so selected becomes the representative of the master. If, therefore, you find from the evidence that defendant, John C. Bull, Jr., did not personally undertake to perform this duty, but that he delegated the same to one R. T. Stone, his superintendent at the south jetty, then I charge you that, as to such duty, the said Stone stood in the place of defendant, and any negligence or failure on the part of said Stone in relation to said duty would be the negligence or failure of defendant." This instruction stated the law correctly, as has been many times held by this court. And the instructions, as a whole, stated all the law applicable to the case with a commendable clearness and precision. Among other things, the court told the jury that "the act complained of here as being negligent was the giving of the signal to the engineer by Astleford to let the hammer fall before the proper signal had been communicated to Astleford," and that, "unless Astleford carelessly and negligently gave the signal to the engineer to drop the hammer, your verdict must be for defendant." There was no error in the giving or refusing instructions. The judgment and order appealed from should be affirmed.

We concur: Searls, C.; Britt, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

WILLIAMS v. SUPERIOR COURT OF LASSEN
COUNTY.

S. F. No. 297; February 6, 1897.

47 Pac. 783.

Justice of Peace—Notice of Appeal—Evidence of Filing.—The marking of the filing of a notice of appeal by a justice is not the only competent evidence of the filing of the paper, and the absence of an entry in the justice's docket is not conclusive proof of the fact that it had not been filed.

Petition by one Williams for a writ of certiorari to the Superior Court of Lassen County. Writ dismissed.

Spencer & Raker and F. C. Spencer for petitioner; Shinn & Shinn for respondent.

PER CURIAM.—The court is unanimously of the opinion that the writ ought to be dismissed. The fact, impliedly found by the court in exercising jurisdiction, that the notice of appeal had been filed, was, under the circumstances, entirely justified. The marking of the filing is not the exclusively competent evidence of the filing of the paper, and the absence of an entry in the justice's docket is not conclusive proof of the fact that it had not been filed. Writ dismissed.

DE WITT v. SUPERIOR COURT OF FRESNO COUNTY.

S. F. No. 556; February 10, 1897.

47 Pac. 871.

Contempt—What Constitutes.—An Attorney for Defendant, in an action in which judgment is rendered that defendant restore possession of premises, who thereupon notifies the sheriff that he is the owner, and in exclusive possession, of the premises, and that defendant is not in possession, and that he will, by all lawful ways, resist any attempt to take possession from him, is not thereby guilty of contempt, though his notice deters the sheriff from serving the writ.

Certiorari by H. G. De Witt to review judgment of the Superior Court of Fresno County. Judgment annulled.

L. L. Cory for petitioner; Geo. B. Graham for respondent.

BEATTY, C. J.—This is certiorari to review the judgment of the superior court of Fresno county adjudging the petitioner guilty of contempt of court. The affidavit upon which the petitioner was cited was as follows:

“[Title, Court, and Cause.]

“State of California,
County of Fresno—ss.:

[Affidavit of Graham.]

“Geo. B. Graham, being duly sworn, deposes and says: That he is now, and at all times since the commencement of the above-entitled action has been, the attorney of the plaintiffs in said action. Affiant now gives this honorable court knowledge and information that said defendant, H. G. De Witt, has committed and is guilty of contempt of this court in the unlawful interference with the process of this court in defying the judgment, process, and officer of this court, and by attempted intimidation of such officer, committed as follows, to wit: On the 18th day of April, 1896, said court rendered its decision in said action, and on the 21st day of April, 1896, in writing, made, signed, and filed its findings and judgment in said action. That, among other things, said court in said action found as follows: ‘That on the 23d day of November, 1895, the plaintiff, Sarah I. Foulke (H. A. Foulke, her husband, joining her therein), made a lease, and leased, demised, and let to Stephen Arthur, the said defendant, the premises situate, lying, and being in the county of Fresno, state of California, described as follows, to wit: Lots 15 and 16 in block 21 in the town of Clovis, as the same appears on the map or plat of said town now on file and of record in the office of the county recorder of the said county of Fresno, for the term of one year from the first day of December, 1895, for the total rent or sum of six hundred dollars, payable fifty dollars in advance on the first day of each and every month during said term. That said defendant, Arthur, was let into and took possession of said premises under said lease, and still continues to hold and occupy the same, as tenant thereof, by virtue of said lease.’ Also the further finding, to wit: ‘That said defendant, Arthur, holds over and continues in possession of said

premises after default in the payment of rent, as aforesaid, without plaintiff's permission, and against her will and consent, and after three days' notice in writing to surrender possession of the same.' That thereupon said court ordered and adjudged that the said defendant, Stephen Arthur, restore to plaintiff, Sarah I. Foulke, the possession of said premises within five days from the date thereof, and that a writ of restitution be, and the same was, awarded. That after the rendition of said judgment, and after the making and filing of said findings and judgment, on, to wit, April 22, 1896, said H. G. De Witt served on Jay Scott, sheriff of the said county, whose duty it was to execute any and all writs in said action, a certain written document signed by him, the same being in the words and figures as follows, to wit: 'To Jay Scott, Sheriff of Fresno County: You will please take notice that I, the undersigned, am the owner of, and in the sole and exclusive possession of, all that certain real property, with the improvements thereon, situated in the town of Clovis, in the said county of Fresno, particularly described as follows: Lots 15 and 16 in block 21 in the town of Clovis, according to the map of said town of Clovis on file and of record in the office of the county recorder of said county of Fresno. That Stephen Arthur is not, nor has he been for some time past, in any manner in the occupancy or possession of said property, or any part thereof, and that in the event, in any manner, you attempt to take possession of said property, or any portion thereof, under or in pursuance of any writ in any judgment rendered in the superior court of the county of Fresno, state of California, in an action therein pending by S. I. Foulke and H. A. Foulke against the said Stephen Arthur, that I will resist any such attempt to take possession thereof, and will treat you as a trespasser, and will hold you responsible on your bond for any invasion of my rights, if you attempt to take possession of said property, or any portion thereof, under or in pursuance of such writ, or otherwise. And that I will resist by all lawful ways and means, and by all reasonable force, any attempt on your part to take the possession of said property from me, or any attempt on your part to place the said H. A. Foulke and Sarah I. Foulke, or either of them, in possession of said property, or any part thereof. Dated April 21, 1896. Yours, etc., H. G. De

Witt. Due service by a copy of the foregoing notice is hereby admitted this 22nd day of April, 1896. Jay Scott, Sheriff, by L. A. Spencer, Under Sheriff.' That by reason of the false statements and threats contained in said notice, said Jay Scott, sheriff, as aforesaid, has been obstructed, deterred, and intimidated in the execution of said writ of restitution issued upon said judgment in said action by the clerk of said court under his hand and the seal of said court on April 28, 1896, and delivered on the same day to said sheriff to execute, and by reason of said threats said sheriff has not and will not execute the same. Wherefore, affiant prays this honorable court to take cognizance thereof, to the end that said H. G. De Witt may be justly dealt with and adequately punished for said contempt.

"[Signed] GEO. B. GRAHAM.

"[Properly subscribed and sworn to.]"

Every court in matters of contempt is a court of special and limited jurisdiction. It has power only to punish those acts which are contempts of its authority, and the question whether the facts alleged amount to a contempt is always jurisdictional.

The facts alleged in the affidavit above quoted do not constitute a contempt of court, and the judgment founded upon it is necessarily void. Said judgment is hereby annulled.

We concur: Harrison, J.; Van Fleet, J.

SYKES v. ARNE.

L. A. No. 123; February 12, 1897.

47 Pac. 868.

Chattel Mortgages—Tender of Amount Due.—When a mortgagor in default as to an installment tenders the amount due before the mortgagee elects to treat as due the entire debt, as the mortgage authorizes him to do on default, the right of election is lost.¹

¹ Cited and followed, as "a case in point," in *Weinberg v. Maher*, 51 Wash. 595, 23 L. R. A., N. S., 956, 99 Pac. 737, which was a suit to foreclose a mortgage of real estate.

APPEAL from Superior Court, Santa Barbara County; W. B. Cope, Judge.

Action by Flora Sykes against W. H. Arne. From a judgment for defendant and an order denying a new trial plaintiff appeals. Affirmed.

B. F. Thomas for appellant; A. E. Putnam for respondent.

VAN FLEET, J.—We regard this action as without any foundation in merit in its inception and as manifestly vexatious and oppressive, and the appeal which is here prosecuted as frivolous. The action was to foreclose a chattel mortgage given to secure eight several promissory notes, amounting in the aggregate to \$675, made by defendant to plaintiff, falling due at different dates; and was prosecuted upon the theory that by defendant's default in the payment of the note first due plaintiff was entitled to treat defendant as in default on all, and recover the entire debt, under a clause of the mortgage which provided: "That if the mortgagor shall fail to make any payment as in the said promissory notes provided, then the mortgagee may take possession of said property, using all necessary force so to do, and may immediately proceed to sell in the manner provided by law, and from the proceeds pay the whole amount in said notes specified." The first note, which was for \$100, fell due January 1, 1895, but allowed ten days' grace. At the maturity of this note plaintiff placed it in the hands of an agent for collection, who, on the 10th of January, presented it for payment at defendant's office in Santa Barbara. Defendant at this time paid \$80 on the note, and asked for time to collect in some outstanding accounts before paying the balance. This request was granted. The agent called again on January 12th, when defendant paid the interest accrued on the note to that date, but asked further time to pay the balance of \$20 due on the principal. Mr. Harsh, the agent, having to return to Los Angeles the following day, told defendant he would leave the note in the hands of Mr. McNulta, a local attorney, and desired defendant to pay the balance by the following Monday. Defendant did not pay the balance on that date, and on January 21st was notified by Mr. McNulta that he must pay the balance on

the next day, January 22d. On the latter date defendant went to the office of Mr. McNulta, and handed him the balance due on the note, which the latter received, and was about to receipt for, but, on the objection of one Elliott, who claimed to represent plaintiff, Mr. McNulta refused to receive the money, and, although earnestly solicited by defendant to accept the payment, returned the money to defendant. Thereafter, on January 25th, plaintiff notified defendant of plaintiff's election to declare all of said notes due, and demanded their payment. This was refused by defendant, and on January 31st this action was commenced. Defendant set up these facts in his answer, and therein again tendered, and deposited in court, the balance due on the note for principal and interest, amounting to \$21. The court found substantially in accord with the averments of the answer, and gave judgment for plaintiff for \$21 without costs.

Plaintiff claims that the evidence does not sustain the findings; that the evidence shows that the agent had no authority to extend time to defendant in which to pay the note; that McNulta's authority to receive payment for plaintiff had been revoked before the tender was made to him on January 22d; that defendant was, therefore, in default, and plaintiff had a right to declare the entire debt due, and proceed to foreclose. None of these contentions find support in the record. The evidence shows that the action of the agent was fully within his authority, and that the tender to McNulta was at a time when he was still authorized to act for plaintiff. The clause in the mortgage gave plaintiff the election, upon defendant's default, to proceed at once for the whole debt, but plaintiff did not see fit so to do. The first default was waived by the failure of plaintiff to take advantage of the right to so proceed, and, before plaintiff elected to proceed, defendant had made a tender of all that was actually due; and plaintiff's right to sue for the unmatured notes was thereby lost. "When the entire debt may be treated as due upon any default in payment of interest or other installment, at the election of the mortgagee or trustee, the whole debt is nevertheless not due until the election has been exercised": 8 Am. & Eng. Ency. of Law, 192, 193, and cases there cited. There were no errors in the rulings on evidence. The whole case would seem to indicate a disposition on the part of the plaintiff to vex and

annoy defendant, as the evidence clearly shows that defendant was ready and anxiously desirous of meeting his obligation before the bringing of the action. We think that such litigation should be discouraged. The judgment and order are affirmed, with \$100 damages to defendant.

We concur: Harrison, J.; Garoutte, J.

BOWERS RUBBER CO. v. BLASDEL.

S. F. No. 428; February 19, 1897.

47 Pac. 931.

Sale—Warranty.—The Fact That a Buyer paid part of the price did not preclude him from relief, in an action for the balance, on account of the worthlessness of part of the goods, where at the time of payment he had no knowledge of the defects.

APPEAL from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Bowers Rubber Company against H. G. Blasdel. From a judgment for plaintiff and an order denying a new trial defendant appeals. Reversed.

Morris M. Estee (Arthur G. Fisk, of counsel) for appellant; Ryland B. Wallace for respondent.

PER CURIAM.—This action was brought to recover the sum of \$4,588, alleged to be the balance due from defendant to plaintiff for one hundred "rubber concentrator belts," manufactured by plaintiff for defendant between January 3, 1893, and December 20, 1893. The defense was that a large number of the said belts were not of good quality, and were not reasonably fit for the purposes for which they were intended. The case was tried by the court without a jury, and, among other things, the court found that sixteen of the belts, "by reason of the inferior quality used in the body of said belts, and the improper manner in which the flanges thereof were molded to the sides or edges thereof, were not fit for the purposes for which they were to be used and were of no value," but that the other eighty-four belts

were all "of good quality and fit for the purposes for which they were intended, and the reasonable value of the material used and labor employed in the manufacture thereof was the sum of \$6,862," of which sum defendant had paid to plaintiff on account \$3,600, leaving a balance due to plaintiff from defendant of \$3,262, which on March 2, 1894, defendant promised in writing to pay to plaintiff, with interest thereon. In accordance with the findings judgment was entered on September 19, 1895, that the plaintiff recover the sum of \$3,615.28 and costs; from which judgment and an order denying a new trial the defendant has appealed.

It is claimed by appellant that the finding that eighty-four of the said belts were all of good quality, and fit for the purposes for which they were intended, was not justified by the evidence, but that, on the contrary, sixty-six of them were badly manufactured, and therefore practically worthless and of no value. Whether the finding referred to was justified or not is the only question which need be considered. To set out the evidence bearing upon the question, even in substance, would make this opinion quite lengthy, and subserve no useful purpose. We have carefully examined the record, and, in our opinion, there was uncontradicted evidence quite sufficient to show that a considerable number of the belts, other than the sixteen which were found to be of no value, were badly manufactured, because of "the improper manner in which the flanges thereof were molded to the sides or edges thereof," and were therefore practically of no value. It was also proved that, when defendant paid the \$3,600 on account, he did not know of the defects in the belts. That part of the finding to the effect that on March 2, 1894, defendant promised in writing to pay plaintiff \$3,262, with interest thereon, is based upon a letter written by defendant on the day named to plaintiff's president, in which he simply says: "I should have paid a portion of the indebtedness some time since, and I will be glad to pay you a good rate of interest on my overtime." The judgment and order appealed from must be reversed and the cause remanded for a new trial. It is so ordered.

PERES v. CROCKER et al.

S. F. No. 96; February 23, 1897.

47 Pac. 928.

Mortgage—Deed Absolute.—In an Action to Declare a Deed Absolute in form a mortgage, a judgment for defendant cannot be set aside where, in confirmation of the presumption of the deed, there was evidence from the conduct of the grantor, and from his pecuniary condition at the time of its execution, and his declarations before and after, that the deed was in fact absolute.

Evidence—Harmless Exclusion.—Where Plaintiff had Already Testified as to what he told his grantee certain lands conveyed by him "ought" to have been worth at the time, exclusion of his estimate of their value was harmless.

APPEAL from Superior Court, Alameda County; W. E. Greene, Judge.

Action by Louis Peres against Mary Ives Crocker and others. Verdict for defendants. From an order denying a new trial plaintiff appeals. Affirmed.

N. Hamilton, Geo. H. Maxwell, R. M. F. Soto (Rodgers & Paterson of counsel) for appellant; Wilson & Wilson and A. L. Rhodes for respondents.

BRITT, C.—Plaintiff claims that certain deeds of land, absolute in form, by him executed to one Charles McLaughlin, whose interest defendants have acquired by devise, were intended by the parties thereto to operate virtually as a mortgage; and he prosecutes this action to obtain an accounting of the rents and profits of the land, and to redeem the same from the effect of the deeds, or compel a reconveyance of the residue after apportioning to defendants enough thereof at its present value to satisfy any indebtedness ascertained to be due from him on such accounting. The court found that the deeds were intended to be absolute, according to their purport, and the chief contention of plaintiff on appeal is that this conclusion was not justified by the evidence at the trial. While acknowledging the presumptions attending the findings, he yet insists that, "resolving every conflict of testimony in favor of the respondents, the whole

evidence taken together, in its legal effect, is counter to the decision of the court, and justly demands a reversal of its action." Invited by the apparent candor with which this contention is urged on behalf of appellant, we have attentively examined the voluminous statement of evidence brought up in the record. We are thus informed that for many years prior to May 12, 1881, an action entitled "Blum v. Sunol and others" was pending in the courts of the state, in which claim was laid by Blum to an undivided two-thirds interest in and to the Rancho de los Vaqueros, more commonly called in the record here the "Basco Ranch," containing about seventeen thousand seven hundred acres, situated in Alameda and Contra Costa counties, and in the possession of Louis Peres, the plaintiff in the present action. The latter had undisputed title in one-third of said rancho, and claimed to be owner of seventeen-eighteenths thereof as purchaser under sundry defendants in Blum v. Sunol, in whose name he defended that suit. In 1879 judgment was rendered in Blum v. Sunol in Blum's favor. Subsequently an order was made granting a new trial. Blum appealed from such order, and his appeal was pending in the supreme court on said May 12, 1881. Peres' interest in the rancho was then encumbered by two mortgages—the first in favor of one Dupuy for the principal sum of \$70,000, the second in favor of one Arsiniega for \$10,000; both mortgage debts being then due, and together amounting, with accrued interest, to above \$95,000. These mortgages were in course of foreclosure in a suit against Peres then recently instituted, and a contract had been made between said Dupuy and Blum for an adjustment of their conflicting interests when by means of the foreclosure the title of Peres should be extinguished. Peres was also under contract with his attorneys in Blum v. Sunol to give them one thousand acres of the rancho as their fee contingent upon success in that litigation. At the same time he owned free of any encumbrance a tract of eight hundred and eighty acres in the near vicinity of the rancho. Such smaller tract was of the value of \$4,400, and his seventeen-eighteenths of the rancho was worth, had the title been clear, say \$170,000. In this posture of his affairs Peres executed to MoLaughlin, on said May 12, 1881, the deeds mentioned at the outset of this opinion; one purporting to be a grant, bargain and sale of the Basco

rancho, the other of said tract of eight hundred and eighty acres. McLaughlin at once took possession of the lands, paid off the said mortgages, and assumed the defense of *Blum v. Sunol*, himself or his successors in estate paying as expenses of that action about \$17,000, exclusive of attorneys' fees. He died December 13, 1883, and his wife, Kate D. McLaughlin, who became his executrix, was sole devisee under his last will. She died on March 16, 1888, leaving a will whereby she devised her whole estate to the defendants in this action. The order granting a new trial in *Blum v. Sunol* was affirmed (63 Cal. 341). The second trial, had in 1884, resulted adversely to Blum. He again appealed, but in July, 1889, a compromise was effected whereby, in consideration of \$8,500 paid by the executors of Mrs. McLaughlin, he released his claims to the rancho. Peres began the present action, July 9, 1890. The lands involved were then worth some \$350,000.

Peres is the only surviving person professing to have actual knowledge of the terms of the oral agreement between himself and McLaughlin which led to the deeds in question. His testimony at the trial was, in effect, that McLaughlin agreed to treat the deeds as a mortgage, and to reconvey the land to Peres when the Blum suit should be won and Peres had repaid him "in money or in land" for his advances to discharge the mortgages and resist the suit of Blum, with interest; also to account for the rents and profits received meanwhile. As tending to corroborate the statements of Peres, we note that the tract of wholly unencumbered land was included in the conveyance; that the land was worth (with clear title) nearly twice the sum necessary to pay off the mortgages of Dupuy and Arsiniega, and besides yielded under the McLaughlin management a gross return in rents, etc., of about \$14,000 per year; that Peres rendered some assistance in procuring testimony for the second trial of the Blum case; also certain evidence of parol declarations by McLaughlin in disparagement of his apparent title. It was testified that he stated to one witness: "It [the rancho] is not mine; if Peres wants it back, I expect to give it to him"; that he took "the fight off Peres' hands to beat Blum"; to another, that he had taken the deeds as security for money advanced to pay off two mortgages, and for money "that I may give him in the future to help him out

in his lawsuit"; and to a third, that he had loaned some money on the rancho. Appellant lays stress also on a promise made to him by McLaughlin that in case of his success in the litigation he would be generous or liberal to him (Peres). It seems to us, however, that this matter has very equivocal significance in the case.

But the court below was of opinion that the lands were conveyed to McLaughlin in consideration of his engaging to discharge the debts of Peres secured by said mortgages, and that he contracted no other obligation to Peres; and tending to uphold this finding there was evidence, besides the matters already stated, that Peres was without money to pay off the mortgages, and expected besides that the future litigation with Blum would necessitate large expense; that when Dupuy insisted on payment of his mortgage Peres threatened to settle with Blum, and allow Dupuy to take what would be left; that when Dupuy forestalled such action, and himself made an alliance with Blum and began suit for foreclosure, both Peres and his counsel in the case of *Blum v. Sunol* were greatly perturbed, and considered the situation desperate; that the transaction with McLaughlin occurred in this emergency; that the value of Peres' undisputed interest in the land was then far below the sum McLaughlin was required to pay for the release of the existing mortgages, while for any purpose of raising money the value of that part claimed by Blum was greatly impaired; that, according to Peres' own statement, no rate of interest to be paid by him to McLaughlin was mentioned between them; that Mr. E. J. Pringle, a gentleman of character and repute as the parties agree, who for many years had been attorney and counsel for Peres, and under whose direction the deed of the rancho to McLaughlin was drawn, had, as he testified, no intimation from Peres that the deed was to serve as a mortgage, but believed it to be absolute, and on that assumption thenceforward conducted the litigation with Blum in the interest of McLaughlin (as he had done previously for Peres), at length compromising the suit without consultation with or objection from Peres; that Peres accepted a lease of part of the rancho from McLaughlin, and paid rent therefor, afterward assigning his lease with McLaughlin's consent and removing from the land; that he made no arrangement for payment of taxes; these were paid

by McLaughlin and his successors, to whom, after 1881, the land was assessed; that Peres never sought an inspection of the accounts of the business of the rancho, nor after the execution of the deeds had or claimed any part in its management. In 1885 Peres owed the executrix \$700 for rents, and a larger sum for cattle he had bought of McLaughlin. The second trial of *Blum v. Sunol* had then been had, and Peres preferred a request for consideration at the hands of the executrix because of her deceased husband's promise to be liberal with him if that suit should be won. She refused, and required payment of his said account for rents and cattle, and thereupon to settle the same he transferred to her a certificate of purchase of one hundred and twenty acres of state land adjoining the rancho. There was, besides, the testimony of several witnesses to divers statements of Peres inconsistent with the theory that he yet retained interest in the title; in substance, that his mortgages became due and he could not hold his land any longer, that he had sold it out to McLaughlin, that McLaughlin was the owner, had got it all, etc. We have endeavored to exhibit only more prominent features of the evidence, omitting matter touching mainly the credit of witnesses, and much besides which may have influenced the court below.

Counsel differ little as to the law of the case. That the evidence to sustain such an action must be cogent and clear has been often remarked. Thus it has been said that "the evidence ought to be so clear as to leave no doubt that the real intention of the parties was to execute a mortgage, otherwise the intention appearing on the face of the deed ought to prevail": *Henley v. Hotaling*, 41 Cal. 27. "Unless the evidence is such as to leave in the mind of the trial judge a clear and satisfactory conviction that the instrument which in form is a deed was intended by all the parties thereto as a mortgage, the finding should be against the plaintiff": *Mahoney v. Bostwick*, 96 Cal. 58, 31 Am. St. Rep. 175, 30 Pac. 1020. So, *Ahern v. McCarthy*, 107 Cal. 383, 40 Pac. 482; *Cline v. Robbins*, 112 Cal. 584, 44 Pac. 1023, and numerous other cases. The trial court is the appropriate tribunal to weigh the evidence, and determine whether it is convincing and satisfactory in the sense of these cases, and its conclusion must be accepted on appeal unless obviously to the view of this court its deductions have no adequate support. In the present instance it

cannot be discerned that the findings are without such support. In confirmation of the presumption attaching to the deeds themselves, we think the court might conclude upon the evidence, without straining the inference, that the conduct of Peres from and after the execution of the deeds was much more consistent with the character of a vendor, having some vague expectation of possible benefit in case success attended the speculation on which his grantee had purchased the estate, than of a mortgagor expecting to be reinstated in the rights and dominion he had temporarily resigned to a mortgagee; while, if adequate motive for the conveyance was essential to be found, it might be discovered in the difficulties of Peres' situation and the contingency which confronted him, that a sale of his property under foreclosure, in the embarrassed condition of his title, would not raise funds sufficient to pay the debts secured on the same.

Peres, called as a witness on his own behalf, was asked by his counsel, "What did you estimate to be the value of those lands at the time of your negotiation with McLaughlin for this money?" The court sustained an objection to the question, and it is insisted that here was error. If it be conceded that the evidence sought by the question was within the rule which allows the motive, belief or intent of a person to be testified by himself directly, and was therefore legally competent, yet we think its rejection could not have prejudiced the plaintiff. He had already testified that he told McLaughlin he had sixteen thousand five hundred or sixteen thousand six hundred acres in the rancho, and it "ought to be worth eighteen or twenty dollars an acre"; also that he would not sell it to him for less than \$350,000. Subsequently it was stipulated between counsel that the value of the rancho at the time in question was \$170,000, this having reference, it seems, to the seventeen-eightieths thereof owned by Peres. Further, to sustain plaintiff's case, it was necessary to show that not only himself, but McLaughlin also, considered or was bound to consider the transaction as a mortgage and not a sale; and no estimate of the value held in the mind of Peres could shed light on the intent of McLaughlin, except that which was communicated to the latter. It is therefore manifest that the result could not have been affected by any answer to the question asked of the witness, and the action of

the court excluding it worked no injury. The order denying plaintiff's motion for a new trial should be affirmed.

We concur: Belcher, C; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order denying plaintiff's motion for a new trial is affirmed.

CITY AND COUNTY OF SAN FRANCISCO v. GROTE.*

S. F. No. 379; February 23, 1897.

47 Pac. 938.

Ejectment for Street.—A City cannot Maintain ejectment for recovery of possession of a street dedicated to the public by user, without showing ownership in the fee.

APPEAL from Superior Court, City and County of San Francisco; A. A. Sanderson, Judge.

Action by the city and county of San Francisco against Ellen Grote. Judgment for plaintiff. Defendant appeals. Reversed.

T. Z. Blakeman for appellant; Harry T. Creswell for respondent.

HAYNES, C.—This is an action in ejectment, brought by the city and county of San Francisco against Ellen Grote to recover the possession, for street purposes, of a small strip of land alleged to be a portion of a public street, dedicated to the public as such. Said alleged street is known as "Garden avenue," and extends through a single block from Divisadero street to Broderick street, between Geary and Post streets, and its alleged width is twenty-five feet. Defendant's lot lies next to Broderick street, with its front on Geary, and has a depth of one hundred thirty-seven and one-half feet, and the demanded premises consists of a strip twelve and one-half feet wide across the rear end of her lot, and which, plaintiff contends, forms part of said street or avenue.

*For subsequent opinion in bank, see 120 Cal. 59, 65 Am. St. Rep. 155, 41 L. R. A. 335, 52 Pac. 127.

The action was tried by the court without a jury, and findings and judgment were for the plaintiff. The defendant appeals from the judgment, and the facts are brought up by a bill of exceptions.

The record presents three questions: (1) Does the evidence show a dedication of the strip of land in dispute to the use of the public for street purposes? (2) If there was such dedication, was there an abandonment of that portion of the street? (3) Can the city and county of San Francisco maintain ejectment for the recovery of the possession of a public street without showing ownership in the land in fee? If the third question above stated should be answered in the negative, the consideration of the first and second questions becomes unnecessary, and we shall therefore consider that question first.

It is conceded by respondent that the defendant owns the fee in the demanded premises, nor is there any question that, if the said street is a public highway, it is such by dedication arising from the acts and acquiescence of the property owners along the same, and its acceptance, shown by the use thereof by the public. In other words, there has been no conveyance by the property owners of the land alleged to be covered by the street, nor has title to the easement been acquired by condemnation or other legal proceedings, but the right or title of the plaintiff and of the public rests solely in parol. Assuming that it is a street, and that the demanded premises is a part thereof, all the right or interest that the public has therein is an easement consisting in the right to use the same for the ordinary purposes of a highway; and such easement is an incorporeal hereditament. "By the common law and the general rule an ejectment will not lie for anything where an entry cannot be made, or of which the sheriff cannot deliver possession. It would follow, therefore, by this rule, that ejectment is only maintainable for corporeal hereditaments. . . . Things that lie merely in grant are not the subjects of ejectment, because these being incorporeal are in their nature invisible, and therefore not capable of being delivered in execution": Tyler on Ejectment, 37. "An action of ejectment will not lie against one claiming an easement in a parcel of land, or to his right to enjoy the same; nor will a writ of entry. But the owner in fee of land may maintain a right of entry to establish his

title to the freehold against one having a prescriptive right of way over the same": Washburn on Easements, 4th ed., 740. Newell on Ejectment, page 17, lays down the following test as to the cases where ejectment is the only proper remedy: "(1) The thing claimed must be a corporeal hereditament; (2) a right of entry must exist at the time of the commencement of the action; and (3) the interests must be visible and tangible, so that the sheriff may deliver the possession to the plaintiff under the writ of possession issuing out of the court." The same author, at page 53, enumerates a large number of easements, among which is a "right of way," "a right to a road," which are "in legal consideration not tangible property, and for the recovery of which the action of ejectment will not lie." In *Payne v. Treadwell*, 5 Cal. 312, it was said: "The action of ejectment is merely a possessory action, and is confined to cases where the claimant has a possessory title; that is to say, a right of entry in the lands." If it be true that an easement is an incorporeal hereditament, and that such hereditaments lie in grant, because not capable of livery of seisin, it is difficult to understand how there can be an ouster or a withholding of the possession, or how manual possession could be delivered by the sheriff.

This question, however, is not a new one in this state. In *Wood v. Turnpike Co.*, 24 Cal. 474, it was held that ejectment does not lie to try the right to a road or right of way. In that case the plaintiff claimed title to the Truckee turnpike road (a toll road) under a conveyance made by the sheriff pursuant to an execution sale thereof, and the action was brought by said purchaser to recover possession of the road. The court said: "The plaintiff acquired nothing by the purchase of the road to which the action of ejectment has any remedial relations. 'Road' is a legal term, strictly synonymous with the word 'way,' and in the complaint and throughout all the title papers of the plaintiff their identity is strictly recognized; and the 'way' is an easement, and consists in the right of passing over another man's ground. It is an incorporeal hereditament; a servitude imposed upon corporeal property, and not a part of it. It gives no right of possession of the land upon which it is imposed, but a right merely to a party in whom the way is vested to enjoy the way. . . . A deed of a way or a right

of way would pass to the grantee no title to or interest in the land. . . . But it is well settled that an action of ejectment will not lie in favor of a party to try his right to enjoy an easement, nor will it lie against one claiming an easement in land to try his right to enjoy it. And the reason is obvious—the very subject matter of controversy is incorporeal. It is for that reason that an easement ‘lieth in grant and not in livery.’ It is for that reason that the owner of a way cannot be disseised or otherwise ousted from it. He can only be disturbed or obstructed in his enjoyment, and for such injury the remedy is by action on the case at common law, or by bill in equity.” *Wood v. Turnpike Co.*, *supra*, was cited and followed in *City of San Francisco v. Calderwood*, 31 Cal. 585, 590, where it was held that a deed of a way or right of way would pass to the grantee no title to or interest in the land; that it is an incorporeal hereditament and servitude imposed upon corporeal property, and not a part of it, and gives no right to possess the land upon which it is imposed. In *Fitzell v. Leaky*, 72 Cal. 402, 14 Pac. 200, it was again said: “The owner of an easement upon the land has no right of entry, nor has he any right to possess the land as such.”

There are several cases in this state which are claimed to be inconsistent with those above cited, and which should be briefly noticed. The case of *City of San Francisco v. Sullivan*, 50 Cal. 603, was an action of ejectment to recover a portion of a street upon which it was alleged the defendant had entered. The complaint, however, alleged that the city and county of San Francisco was “the owner thereof, subject to the right of its citizens to pass and repass over the same.” The court said: “We are of the opinion that the force of the allegations that the plaintiff here is the owner and entitled to the possession of the premises sued for is not impaired or affected by the further allegation that the public has an easement therein as a public street. . . . The existence and enjoyment of the easement is entirely compatible with the seisin of the plaintiff as being the owner of the fee.” This case, so far as we have quoted the opinion of the court, clearly sustains the general doctrine that the owner of the fee subject to an easement may maintain ejectment against an intruder who asserts a right inconsistent with the easement, and is not inconsistent with the cases we

have above cited. It is true, the court quoted a paragraph from Dillon on Municipal Corporations, the first part of which is directly to the point in the case there before the court. The latter part of the quotation has no application to that case. This extract, however, we shall have occasion to notice in another connection. The case of *City of Visalia v. Jacob*, 65 Cal. 434, 4 Pac. 433, was also an action of ejectment for a portion of a public street. The demurrer to the complaint was sustained, and judgment rendered for the defendant. The complaint, however, in that case alleged that the plaintiff was "seised of and entitled to possession of the land, the same being a portion of a public street duly laid out and dedicated to the public use." This allegation is equivalent to an allegation that the fee of the land was in the city. The court in that case also cited Dillon on Municipal Corporations and *City of San Francisco v. Sullivan*, supra. It would appear from the language of the complaint that the defendant demurred on the ground that the complaint showed the cause of action was barred by the statute of limitations, and the opinion principally discusses the question whether title to the land dedicated to the public as a street could be acquired by adverse possession.

Southern Pac. Co. v. Burr, 86 Cal. 279, 24 Pac. 1032, is also cited by respondent. That case, however, is clearly distinguishable from the case at bar. In that case the plaintiff was granted by Congress a right of way over the public lands, four hundred feet in width, for the purposes of a railroad. The action was ejectment to recover from defendant a portion of said right of way occupied by him. The court in its opinion referred to the case of *Wood v. Turnpike Co.*, supra, and distinguished it from the case then under consideration. The grant of the right of way to the railroad company was necessarily exclusive as to the right of occupancy. Quoting from *Railroad Co. v. Benity*, 5 Saw. 118, Fed. Cas. No. 2551, it was said: "It may be admitted that for the obstruction of a mere easement the recovery of the possession of the land itself would not be the proper remedy; but, in order that the plaintiff in the case at bar may make such use of the land as the grantor intended it should under a grant of right of way, it becomes necessary to take and keep an actual possession of the land. It must also be a possession exclusive of all other persons": 86 Cal. 285, 24

Pac. 1033. This case, therefore, does not conflict with the views we have above expressed. In the case of *City of Eureka v. Armstrong*, 83 Cal. 623, 22 Pac. 928, and 23 Pac. 1085, and the case of *City of Eureka v. Fay*, 107 Cal. 166, 40 Pac. 235, the action was ejectment for land alleged to be a portion of a public street. In neither of these cases, however, was any question made or considered in relation to the form of the action. But for the quotation of the passage from Dillon on Municipal Corporations in the case of *City of San Francisco v. Sullivan*, supra, and *City of Visalia v. Jacob*, supra, there is no real conflict in the decisions in this state upon the subject under discussion, and in neither of those cases was it necessary to decide the question here involved, inasmuch as in both cases it appeared that the fee in controversy was in the plaintiff.

The great consideration which should be given to all propositions of law stated by the learned author above mentioned requires that some notice should be given it. Section 662 of said work is as follows: "A municipal corporation entitled to the possession and control of streets and public places may, in its corporate name, recover the same in ejectment. Where it possesses the fee, although in trust for public uses, there are no technical obstacles in the way of maintaining such action against the adjoining proprietor, or whoever may wrongfully intrude upon, occupy or detain the property. And, where the adjoining proprietor retains the fee, the courts have overcome the technical difficulties by regarding the right to the possession, use and control of the property by the municipality as a legal, and not a mere equitable, right." I have examined all the American cases cited by the learned author in the note to said section. The New Jersey cases, it may be conceded, sustain the text, though it will be observed that two of the five cases cited were in equity. Of the cases at law, in *Den v. Dummer*, 20 N. J. L. 86, the land in question was dedicated by the owner of the town-site upon a recorded plat for a public market ground. *Trustees of M. E. Church v. Mayor etc. of Hoboken*, 33 N. J. L. 13, was to recover possession of land dedicated upon the original town plat as a public square. The third case—*Hoboken Land & Improvement Co. v. Mayor etc. of Hoboken*, 36 N. J. L. 540—involved the right to a street, which, by the original plat, extended back from high-water mark on

the Hudson river. The improvement company—the plaintiff in error, and the defendant below—succeeded to the ownership of the land platted so far as it remained unsold, and was granted a charter by the legislature to fill in land covered by water in front of their property, and construct wharves, etc., but it was provided “that it should not be lawful for the company to fill up any such land covered with water . . . in front of the lands of any other person owning down to the water without the consent of such person in writing.” It was held that the city could recover, in ejectment, the street to the new high-water line: *City of Winona v. Huff*, 11 Minn. 119 (Gil. 75). In a town plat, made under the statute, certain squares mentioned in the certificate to the plat were declared to be for “public use and benefit forever.” It was held as to such dedication the plat itself operates as a conveyance to the public, and a claim by the public is unnecessary; that under a statutory dedication the fee simple to the land does not pass, but only such an estate or interest in the land as the trust requires. In the opinion (page 136, 11 Minn. [Gil. 85]) the court said: “The action of ejectment is a mixed action, and the form of remedy by which a person is entitled to recover possession of real property in fee, for life, or for years. It does not lie where the thing to be recovered is incorporeal: *Saund. Pl. & Ev.*, tit. ‘Ejectment,’ p. 446. The purpose for which the action is brought is not to try the mere abstract right to the soil, but to obtain actual possession: *Jackson v. Huntingdon*, 6 Pet. 442. For a mere easement, perhaps, the action will not lie; but wherever a right of entry exists, and the interest is tangible, so that possession can be delivered, an action of ejectment will lie: *Chit. Pl.* 188, 189; *Jackson v. Buel*, 9 Johns. 298. If, therefore, the plaintiff has an interest in the land and the right of possession, this action may be maintained.” It was further held by the court in that case that dedication of lands for different purposes may require different interests or estates to support them. As, for instance, a dedication of land for public buildings, or a burying ground, or a public square, which may be inclosed, improved and ornamented for purposes of pleasure, or amusement, or recreation, or health. In *Weeping Water v. Reed*, 21 Neb. 261, 31 N. W. 797, the action was to recover the possession of a square marked “College Square.” It was held that

there was a dedication of College Square to the public, with a right to the use thereof for the purposes of an institution of learning so long as the user continued, the title remaining in the public as represented by the municipal corporation for that use, and ejectment will lie to remove any person in unlawful possession. In *City of Hannibal v. Draper*, 15 Mo. 634, it was held that the memoranda, "Lots numbered 2, 3, 4, in block 26, is intended for church grounds," and as concerning the lots were written the words "church ground," appearing upon a duly acknowledged plat of the town of Hannibal, it was sufficient, under the act concerning plats, towns and villages, to vest the fee in the county for public use. In *City of California v. Howard*, 78 Mo. 88, the action was ejectment for a public street. It was held: "A city invested by law with the title in fee, and the right and control over all public streets, may maintain ejectment for land dedicated for a street." In *City of Chicago v. Wright*, 69 Ill. 318, 322, the court quoted the above extract from *Dillon on Municipal Corporations*. That case, however, was a bill in equity, brought by Wright against the city of Chicago and the chief of police, to prevent them from removing certain fences from lands claimed by the city to be a public street. The only ground suggested by the author upon which ejectment is sustained in such cases is "by regarding the right to the possession, use and control of the property by the municipality as a legal, and not a mere equitable, right."

If it be conceded that where the dedication appears of record, as by recording a plat with streets delineated thereon, and the sale of lots described as bounded thereby, and especially where the municipality has expressly accepted the dedication, the action of ejectment may be maintained—a proposition we neither concede nor decide—the case here is very different. There was no dedication by filing a plat showing the existence of any street through the center of the block. Some of the conveyances described the lot as abutting on "an alley," but without designating the width of the alley. Defendant's lot extended to the center of the block, and the conveyance from plaintiff was silent as to an alley. If there was any dedication of the avenue or alley, it was by the individual owners of the lots. There was not, except as to irregular portions, any reservation in the deeds

executed by the city of the land covered by the alleged street, and as to the land not conveyed no purpose was expressed in the conveyances; and whether there was any dedication rested wholly upon parol testimony of the acts and declarations of the respective owners, and the use of the way by the public. We think that, whatever may be the rule in cases where the evidence of dedication may be shown from the public records, such evidence of dedication as was given in this case will not support an action of ejectment. It is undoubtedly the general rule that in an action of ejectment legal title to land cannot be proved by parol, and, where not permitted by statute, equitable defenses thereto cannot be heard. The judgment appealed from should be reversed and the action dismissed.

We concur: Britt, C.; Belcher, C.

• **PER CURIAM.**—For the reasons given in the foregoing opinion the judgment is reversed, with directions to dismiss the action.

PEOPLE v. FOURNIER.

Crim. No. 203; February 26, 1897.

47 Pac. 1014.

Arson — Evidence — Cross-examination.—On a Trial for Arson, Where the evidence is circumstantial, and a witness for the state testifies that she was awakened during the night by the smell as of burning rags, she may be asked on cross-examination whether there was not a great deal of rubbish in the back yard, near where the fire originated.

Arson—Evidence.—Where the Fire was Seen in Rubbish in a yard near the building burned, evidence that the rubbish was on fire in the same yard the day previous was admissible.

Arson—Evidence.—Where a Suspicious Circumstance in the evidence against defendant was the removal of certain goods from the burned building the day before the fire, it was error to exclude evidence of defendant explaining the removal.

Arson—Evidence.—Where a Suspicious Circumstance against defendant was that his building was insured, evidence that the building of a third person in which the fire started was also insured was admissible.

APPEAL from Superior Court, Madera County; W. M. Conley, Judge.

Joseph Marie Achille Fournier was convicted of destroying by fire a certain building with intent to defraud an insurance company, and appeals. Reversed.

Raleigh E. Rhodes and John R. Kittrell for appellant; W. F. Fitzgerald, attorney general, and C. N. Post for the people.

TEMPLE, J.—The defendant was charged, under section 548 of the Penal Code, with the offense of willfully destroying by fire a certain building, with the intent to defraud the Palatine Insurance Company, Limited, of Manchester, England, a corporation, in which company the property was then insured. A fire occurred in the town of Madera on the 27th of July, 1895, in which several buildings were consumed, one of which belonged to the defendant, and was insured for the sum of \$600. The witnesses all agreed that the fire commenced either in the building occupied by the Tribune newspaper, between which and the defendant's building there was a space of eight feet, or somewhere along the line of a fence running northerly from the rear of the Tribune building some twenty feet to a shed adjacent to the dwelling occupied by the defendant and his wife. The defendant did not own the land upon which the building was, but occupied the same under a lease, and had built a small wooden house on the southeast corner of the lot, which he occupied as a saloon. On the rear of the lot, and some forty feet from the saloon, northerly, was the dwelling spoken of. Some of the witnesses—and apparently those who were first at the fire—testified that when first discovered by them it was immediately in the rear of the Tribune building, back of which was a little porch; others, that when they saw it it was upon the fence mentioned, and was spreading rapidly along the fence from the dwelling occupied by the defendant toward the Tribune building. The fence partly divided the lot occupied by the defendant from the lot upon which the Tribune building was situated. The evidence that the fire was of incendiary character, and tending to cast suspicion upon the defendant, was entirely circumstantial. That which tended to show that the fire was of an incendiary character,

aside from that which cast suspicion upon the defendant, was the testimony of some of the witnesses that the fire was proceeding along the fence from the dwelling of the defendant to the Tribune building rapidly, indicating that the fence might have been saturated with coal-oil, and that they perceived the odor of coal-oil.

The evidence which tended especially to raise a suspicion against the defendant was simply and only: (1) That he was a Frenchman, and had announced his intention of soon returning to France, and that he had an insurance upon the building, as stated. (2) On the very day of the fire he removed from the saloon to his dwelling a barrel of brandy and two cases of champagne. And (3) he and his wife were, shortly before the fire, sitting on the sidewalk by the saloon. The fire occurred shortly before midnight, and defendant and his wife claimed that they were both in bed at the time the alarm was given. The fire occurred in the middle of summer, and it appeared that in the rear of the printing office, which was first on fire, there was a great deal of rubbish, consisting of old rags, paper, straw, etc. A witness for the prosecution, who occupied one of the houses destroyed, testified that she was awakened during the night by mosquitoes, and immediately smelled fire, as of burning rags. She looked from her window, and saw the fire. She thought it was back of the Tribune office, nearer the office than the fence; and finally she stated that she was sure that it was under the porch, back of the Tribune building. On cross-examination the witness was asked as to the condition of the premises—whether there was anything on the ground in the shape of rubbish, paper or anything of the kind. The question was objected to as incompetent, immaterial and irrelevant, and not cross-examination, and the objection was sustained. On like objection the court refused to permit an answer to the question whether at other times she had not perceived the odor of coal-oil upon the premises, and the court also refused to permit the question whether, on the day before the fire, there had not been a pile of rubbish on fire, back of the Tribune office. These rulings were assigned as error here, and the attorney general hardly attempts a defense of them.

One question of interest at the trial was whether the fire ran along the fence from defendant's dwelling toward the

Tribune building, or was first discovered in the Tribune building, or immediately at the rear of it. The attention of the witness was first aroused by the smell of burning rubbish—rags. This first gave the alarm. The evidence was, therefore, quite material. The court sustained the objection to the existence of the burning rubbish on the 26th of July, on the ground that it was too remote in time. That was a question for the jury, and not for the court. No one would say that the time was so remote that it was absolutely impossible that a spark could be kept alive until the destruction of the building complained of. The ruling was clearly erroneous and injurious.

The court also erred in refusing to permit the defendant to show that the building owned by the witness Parsons was also insured. If the fact that the defendant's building was insured raised a presumption against him, it was competent to show that the person owning the building in which the fire first started had a like inducement to commit the crime.

A witness for the defendant (his wife) testified that the brandy and champagne were removed from the saloon because defendant expected certain persons who wished to buy the building and stock to inspect the same on the next day. Defendant offered to prove, in addition, the fact that two persons were expected to come upon that day, and did actually arrive upon the following day at Madera, pursuant to their appointment to inspect the building, with a view of making such purchase. The reason given why the removal was made under such circumstances was that whoever wished to buy the building and stock would want everything in sight thrown in, and would give no more for the property. The defendant should have been allowed to explain this act, which probably, more than any other, tended to cast suspicion upon him. It was for the jury to determine the truth and value of the explanation.

It is contended by the defense that the evidence was insufficient to justify the verdict, and it was certainly very weak. I doubt if an unprejudiced jury would have found a verdict of guilty upon it; but it is not necessary to reverse the case for that reason, as there are other sufficient grounds. Judgment and order reversed.

We concur: McFarland, J.; Henshaw, J.

EX PARTE VINTON.

Crim. No. 263; March 2, 1897.

47 Pac. 1019.

Habeas Corpus.—A Prisoner not Brought to Trial Within Sixty Days after commitment will be discharged on habeas corpus.¹

Application of John M. Vinton for discharge on habeas corpus. Granted.

Henley, Bigelow & Costello for petitioner.

PER CURIAM.—Petitioner discharged.

GAROUTTE, J.—I dissent. The prisoner is discharged by the court upon the ground that he has not been brought to trial within sixty days after his commitment. I am well satisfied that the writ of habeas corpus cannot be invoked in a case of this character.

I concur: Temple, J.

¹ Cited and followed in *Ex parte Ford*, 160 Cal. 339, 116 Pac. 759, where it is held that a defendant, failing to be brought to trial within the statutory period, and there being no good cause for delay shown, may move to have the indictment dismissed, which motion must be sustained. If, however, it is denied, the defendant may avail himself of the writ of habeas corpus.

Cited in *Ex parte Ford*, 160 Cal. 345, 116 Pac. 761, in contrast with *Ex parte Strong*, 31 Pac. 574, the latter case being to the effect that until the indictment is dismissed, the imprisonment is lawful, a ruling which, the court here say, is in accord with decisions in other states but not those of the California courts.

Cited in *Ex parte Ford*, 17 Cal. App. 4, 118 Pac. 97, where the court say that the rule that, unless good cause be shown to the contrary, a prisoner not brought to trial within sixty days after indictment must be discharged, was first announced in the cited case.

Ex Parte O'BRIEN.

Crim. No. 255; March 5, 1897.

48 Pac. 71.

Divorce—Subsequent Order for Alimony.—Where, on rendering a decree of divorce, the question of alimony is reserved, a subsequent order awarding alimony is not void.

Application by one O'Brien for a discharge on habeas corpus. Denied.

Beatty & Beatty for petitioner; Henley, Bigelow & Costello for respondent.

BEATTY, C. J.—In this proceeding the order of the superior court amending the original decree in the case of O'Brien v. O'Brien is conclusive upon me, and the decree as amended shows that the question of alimony was reserved. This being so, the subsequent order or supplemental decree awarding alimony is not void, and the court did not exceed its jurisdiction in imprisoning the petitioner for his refusal to pay the sums decreed to be paid. The prisoner is remanded.

BARRY v. ST. JOSEPH'S HOSPITAL AND SANITARIUM OF THE SISTERS OF MERCY et al.

L. A. No. 185; March 10, 1897.

48 Pac. 68.

Cancellation of Deed—Inadequacy of Price—Ratification.—Mere inadequacy of price is insufficient to warrant setting aside a sale.

Deed by Sick Person for Care—Ratification.—Where a person sick in the hospital makes a deed to it for a certain sum paid and an agreement for further care, and recovers, and for several weeks is able to transact business, and up to the day of his death is satisfied with the transaction, it amounts to a ratification thereof.

Deed for Care and Support.—In a Suit to Set Aside a Sale Made in consideration of a promissory note and board and care, plaintiff cannot recover unless she offers to return the note, and pay for the board and the care.

APPEAL from Superior Court, San Diego County; W. L. Pierce, Judge.

Action by Margaret J. Barry, administratrix of John M. Little, against the St. Joseph's Hospital and Sanitarium of the Sisters of Mercy and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Trippet & Neale and C. F. Holland for appellant; Parrish & Mossholder and Deney & Wright for respondents.

BELCHER, C.—The plaintiff, as administratrix of the estate of John M. Little, deceased, brought this action to have a deed of three pueblo lots in the city of San Diego, executed by the decedent to the defendant St. Joseph's Hospital and Sanitarium, on February 5, 1895, canceled and set aside, upon the ground that at the time of its execution the grantor was sick and infirm, and mentally incompetent to attend to any kind of business, and that there was no sufficient consideration for its execution. At the trial certain issues were submitted to a jury, and the court made other findings, and gave judgment in favor of the defendants. From that judgment the plaintiff appealed, and has brought the case here on the judgment-roll.

It appears from the findings that on February 5, 1895, Little was sick and confined to his bed in defendant's hospital, and was then in a condition of imbecility or great weakness of mind; that the deed was procured by no undue influence; that the consideration for the deed was not grossly inadequate; and that at the time of its execution the value of the property conveyed was \$2,000. It further appears that the consideration for the deed was a written agreement entered into by the parties, under and in pursuance of which the defendant corporation executed and delivered to Little its promissory note for \$500, and agreed to furnish him a private room in its hospital, and to support and maintain him for and during the term of his natural life, to furnish, provide and prepare for him proper and sufficient food, and to give him proper care, nursing and medical attendance in sickness, and, upon his death, to provide a respectable burial of his remains. The agreement also provided that, in case of the rescission thereof for any good and reasonable cause by either party, \$40 per month from its date to the date of

the rescission should be a just compensation for the board, lodging and medical attendance furnished during said period. It further appears "that on the twenty-sixth day of February, 1895, said Little had so far recovered from his said sickness as to be able to be out of doors and walk about; and that on said twenty-sixth day of February said Little knew he had signed said deed and said contract for a home; and that for several weeks thereafter said Little was able to be out of doors, and to walk about, and to go into the business portion of said city, and able to transact business"; and that on the twenty-seventh day of May, 1895, he died. It also appears that on June 22, 1895, the defendant corporation sold and conveyed the said lots to the defendant Mary J. Moulton; and, as a defense to the action, it is alleged that she purchased the lots for the consideration of \$1,450, without any notice or knowledge of the facts set out in the complaint; and it is admitted by appellant that, under these circumstances, the cancellation of the deed of February 5th had become impossible; but it is claimed that the court below could and should have awarded to the plaintiff the alternative relief of damages, and that the amount of damages should have been the difference between the value of the lots, \$2,000, and the amount actually paid therefor by the grantee, namely, \$500, evidenced by its promissory note, and \$40 per month for the board, lodging and medical attendance furnished the grantor during the three months and twenty-two days that elapsed between the date of the deed and his death.

It is argued for appellant that the consideration paid for the deed amounted to only \$649.33, while the value of the property conveyed was at that time \$2,000; and that such consideration must be held to have been grossly inadequate, notwithstanding the finding to the contrary; and hence that the judgment is not supported or justified by the findings, and should be reversed. But the consideration cannot be limited to the sum named. The agreement was that Little should be furnished with a private room, and board, care and medical attendance in sickness, during the term of his natural life. He was then only seventy years old, and it may have been, and probably was, anticipated by both parties to the agreement that he would live for several years; and, if he had lived a little more than three years longer, the cost of his board, care and medical

attendance, at \$40 per month, with the said \$500, would have equaled the full value of the land. Besides, mere inadequacy of price is not alone sufficient to warrant a court in setting aside a sale: *Hammond v. Wallace*, 85 Cal. 522, 20 Am. St. Rep. 239, 24 Pac. 837. Moreover, it appears that, shortly after executing the deed, Little recovered from his sickness, and was on the streets, and for several weeks was able to go into the business part of the city, and transact business, and knew that he had signed the deed and contract for a home; and, so far as appears, he was during all that time, and up to the day of his death, fully satisfied with the transaction. Under these circumstances, he must be held to have ratified and confirmed it. Under our statute a contract may be rescinded for various reasons; but the party desiring to rescind must act promptly, and must restore, or offer to restore, to the other party, everything of value received from him under the contract: Civ. Code, secs. 1689, 1691. Here, conceding that the plaintiff acted with sufficient promptness in commencing the action, still it does not appear that she restored, or offered to restore, the promissory note received by Little, or to pay for the board, care, etc., which he received up to the time of his death. She cannot therefore avail herself of the statute. We advise that the judgment be affirmed.

We concur: Searls, C.; Britt, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

SANTA MONICA LUMBER & MILL CO. v. HEGE et al.*

L. A. No. 158; March 10, 1897.

48 Pac. 69.

Mechanics' Liens—Proceedings to Perfect—Time of Filing.—Where there was evidence that buildings were, in effect, completed before the claim of lien was filed, a finding to that effect will not be disturbed, though there was evidence of trifling imperfections remedied after such time.

Mechanics' Liens—Landlord and Tenant—Notice.—Where the owner of a lot gives permission to his tenant to erect a building

*For subsequent opinion in bank, see 119 Cal. 376, 51 Pac. 555.

thereon of a certain character, and the tenant does so, he had such knowledge of the intended construction of the building as to render a notice posted by him after the lien was filed, on visiting the premises, too late, under Code of Civil Procedure, section 1192, providing that buildings constructed on lands with the owner's knowledge shall be held to be constructed at his instance, and liable for a lien, unless, within three days after knowledge of the construction, he post notices thereon.

Mechanic's Lien.—In an Action to Enforce a Materialman's Lien, plaintiff can recover only for the materials furnished between the dates stated in the claim of lien, though the proof shows that materials were furnished on other dates.¹

APPEAL from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by the Santa Monica Lumber and Mill Company, a corporation, against J. H. Hege and William Naumann, to enforce a materialman's lien. From a judgment in favor of plaintiff and from an order denying a new trial defendant Hege appeals. Reversed.

Clarence A. Miller for appellant; Tanner & Taft for respondent.

BELCHER, C.—This is an action to foreclose a lien for materials furnished for and used in the construction, alteration and repair of certain buildings on a lot of land in the town of Santa Monica, county of Los Angeles. Defendant Hege was the owner of the lot, and defendant Naumann was the lessee thereof. The materials were furnished by plaintiff upon the order of Naumann, and were of the alleged value of \$244.59. Naumann suffered his default to be entered. Hege demurred to the complaint, and, his demurrer being overruled, answered. The case was tried, and the court found, among other things, that all the allegations of the complaint were true, except that \$75 instead of \$100, as stated therein, would be a reasonable attorney's fee, and, as conclusions of law, that there was "due to the plaintiff from the defendants the sum of \$244.59, and the further sum of \$1.45, expenses of recording said lien, and the further sum of \$75, hereby allowed as attorney's fees; that defendant Dr.

¹ Cited in note in 35 L. R. A., N. S., 908, on effect of addition of new items to extend time for filing mechanic's lien.

Wm. Naumann is personally liable therefor, and that the amounts aforesaid are, and each of them is, a valid lien against the real property described in the complaint, and of every part and parcel thereof, and plaintiff is entitled to a decree foreclosing its said lien against said real property." Judgment and decree were accordingly so entered, from which and from an order denying a new trial defendant Hege appeals. Several grounds for reversal are urged by appellant, but only the following need be noticed:

1. It is insisted that the claim of lien was prematurely filed, and hence that it conferred no rights. The statute provides that any person, save the original contractor, claiming the benefit of the chapter in regard to liens of mechanics and others upon real property, must "within thirty days after the completion of any building, improvement or structure, or after the completion of the alteration, addition to or repair thereof," file for record his claim of lien, etc., and that "any trivial imperfection in the said work, or in the construction of any building, improvement or structure, or of the alteration, addition to or repair thereof, shall not be deemed such a lack of completion as to prevent the filing of any lien," and also that "cessation from labor for thirty days" shall be deemed equivalent to a completion: Code Civ. Proc., sec. 1187. It has been held that the filing of a claim of lien before the time authorized by the statute is premature, and no right to enforce the lien is thereby acquired: *Roylance v. Hotel Co.*, 74 Cal. 273, 20 Pac. 573; *Schwartz v. Knight*, 74 Cal. 432, 16 Pac. 235; *Willamette Steam Mills Lumbering etc. Co. v. Los Angeles College Co.*, 94 Cal. 229, 29 Pac. 629. It was alleged in the complaint and the court found that "the said buildings and repairs were completed on the twenty-third day of July, 1894," and that on the eleventh day of August, 1894, the plaintiff duly filed its claim of lien, etc. We find in the record no evidence tending to show that the buildings and improvements were fully completed on the day named, or at what particular time they were completed. Plaintiff's witness Emerson testified that he worked as a carpenter on the buildings, and that he finished work in the latter part of June, "and the buildings were completed shortly after." And on cross-examination he testified that what he knew of matters that occurred after he quit work was what he saw on passing by the property, which was

nearly every day; that he did not see any person working on the buildings after the date he stated they were completed; and that he did "not know whether on August 11, 1894, any sidewalks had been laid on the premises, or whether the ridge of the roof had been closed, or was water-tight. The windows were puttied on the inside, but whether they were also puttied on the outside I do not know, or whether any cleats were on the windows, or whether the windows were rain tight, or whether all the battens were on the building, nor whether the bathtubs were entirely finished." Dr. Naumann testified for defendant that when the claim of lien was filed the buildings were unfinished in the particulars spoken of by Emerson, and in some other particulars, and that after August 11th he employed two or three workmen on the buildings for five or six days in all. Respondent contends that it is a case of conflicting evidence, and that under the settled rule in such cases the finding of the court cannot be disturbed, and also that the defects relied on were trivial imperfections, which could not prevent the filing of the lien. This contention, we think, should be sustained. The court below saw and heard the witnesses, and could determine better than we can whether the defects were in fact trivial imperfections, and the buildings were in effect completed before the claim of lien was filed.

2. The statute provides that every building constructed upon any lands with the knowledge of the owner shall be held to have been constructed at the instance of such owner, and the interest owned shall be subject to any lien filed in accordance with the provisions of the code, unless such owner shall, within three days after he shall have obtained knowledge of the construction, or the intended construction, give notice that he will not be responsible for the same, by posting a notice in writing, etc.: Code Civ. Proc., sec. 1192. The court found that "the said constructions and repairs were made and the said timber and materials were furnished by plaintiff with the full knowledge and consent of defendant Hege from their inception, and the said Hege gave no notice, by posting a notice in writing to the effect that he would not be responsible for the same, nor did he give any notice at all, either by posting or otherwise." Appellant contends that this finding was not justified by the evidence, but we think it must be sustained. It appears that Naumann was

a practicing physician, and that he leased the premises and took possession of them, with his family, consisting of his wife and six children, early in May, 1894. Appellant lived in Los Angeles, about sixteen miles away, and a week or ten days later he visited the place, and Naumann then asked of him permission to build another house on the lot. Appellant gave him permission to build a small shanty, half of wood and half of glass, far enough away from the dwelling already on the place not to interfere with it in any shape or manner, to be perfectly detached, in the rear of the lot, and without fire in or about it. And in the latter part of July, or first of August, Naumann wrote to appellant and asked permission to put up another building; and the latter answered that he might do so, but it must have no fire, and must not be attached to the house. Naumann proceeded to erect the buildings in controversy, and placed them in the rear of, and in part adjoining, the dwelling-house on the lot. A day or two after the claim of lien was filed, appellant again visited the place, and then posted notice that he would not be responsible. Under these circumstances, we think it must be held that appellant had knowledge of the construction or the intended construction of the buildings, and that his notice was not posted in time. And the fact that the buildings were not placed on the rear end of the lot, and perhaps were not constructed as appellant intended they should be, cannot be availed of, as against the respondent, that knew nothing of his intentions in these respects.

3. It is stated in respondent's claim of lien that "on or about the first day of July, 1894," Dr. Naumann, as lessee of said premises, entered into a contract, not in writing, with the Santa Monica Lumber and Mill Company, under and by which said company furnished said lumber and materials, and that said contract was fully performed on the part of said company, and was completed on July 14, 1894. It is alleged in the complaint that the contract was entered into on the first day of July, but in the findings the language used is the same as in the claim of lien. At the trial it was proved, on behalf of the plaintiff, that its first charge for materials furnished was made on May 24th, and its last on July 14th; that the aggregate of its charges was \$419.59, of which sum \$175 had been paid, leaving still due and unpaid \$244.59; and that after June 25th there were only four

charges, which were made in July, and amounted to \$29.02, and the payments after that date amounted to \$115. Appellant contends that, at most, he could be held responsible only for the materials furnished between the dates named in the claim of lien; and in support of this contention he cites the case of *Goss v. Strelitz*, 54 Cal. 640. That was an action to foreclose a lien for materials furnished for the construction of a building, and in the claim of lien it was stated that the materials were furnished between February 20 and April 14, 1877. It appeared that some of the materials were furnished before February 20th, but it was held that the plaintiff was entitled to recover only for the materials furnished between the dates stated in the claim. That case seems to be directly in point here, and under the law as there declared the respondent was not entitled to recover for materials furnished before, "on or about the first day of July." The words "on or about" leave the time when the contract was made somewhat indefinite and uncertain, but we think the language used cannot be held to extend back to the 24th of May, and that it should be limited to time alleged in the complaint. It follows that the judgment and order appealed from should be reversed and the cause remanded for a new trial.

We concur: Searls, C.; Britt, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are reversed and the cause remanded for a new trial.

LEEDOM v. HAM et al.

L. A. No. 134; March 23, 1897.

48 Pac. 222.

Partnership—Rights of Partner.—Plaintiff, Having Leased a Farm, and taken S. as a partner, agreed that the lessor might sell enough of the future crop to pay the rent; whereupon the latter bargained nineteen tons to third persons, but nothing was paid, nor any delivery made to them or to the lessor. Subsequently the whole crop, amounting to less than nineteen tons, and which constituted the entire partnership assets, was attached as the property of S., and

purchased at execution sale by the attaching creditor. Held, that under Civil Code, section 2405, giving each partner a lien on the assets for the payment of firm debts, and for any general balance due him, plaintiff was entitled to recover his share from the creditor.

Partnership—Rights of Partners.—Plaintiff was not Estopped, though he had, through mistake of law, notified the officer at the time of the attachment that he owned one-half the crop, "less nineteen tons belonging to" the lessor.

APPEAL from Superior Court, San Bernardino County; George E. Otis, Judge.

Action by W. T. Leedom against A. M. Ham, H. H. Ham and Smith Leedom for an accounting of a partnership between plaintiff and the last-named defendant, and to recover the value of property converted by the other defendants. Defendant Leedom defaulted, and from a judgment for defendants Ham and from an order denying a motion for new trial plaintiff appeals. Reversed.

E. R. Annable and Geo. B. Cole for appellant; T. C. Chapman and Rolfe & Rolfe for respondents.

BRITT, C.—Plaintiff leased of one Gregory ninety-five acres of land, and also purchased of Gregory barley to seed the same for a crop of grain hay; the lessor extending credit for both rent and seed upon an understanding that he should be paid therefor from the first proceeds of sale of the crop. Plaintiff then took one Smith Leedom as a partner in the business of raising the crop, they agreeing to share equally the net avails, Gregory to be first paid. The crop was grown by them pursuant to such arrangement, and constituted the only partnership assets. Its value was less, it seems, than the partnership liabilities. While the harvesting thereof was in progress, plaintiff agreed with Gregory that the latter might sell enough of the hay to pay the sums due him for rent and seed, and that plaintiff would deliver to the purchasers the quantity thus sold. Accordingly Gregory bargained nineteen tons of the hay to certain persons at an agreed price, but nothing was paid, nor was any hay delivered either to Gregory or such purchasers. A few days later the whole crop was attached as the property of said Smith Leedom in a suit brought against him by A. M. Ham and H. H. Ham. They subsequently caused it to be sold

under execution in that suit, and became the purchasers thereof, and converted it to their own use. Plaintiff prosecutes this action against A. M. and H. H. Ham and Smith Leedom for an accounting of the affairs of his partnership with said Smith (who is insolvent) and judgment against the Hams for the value of the crop. When said attachment was levied, plaintiff served on the attaching officer written notice stating himself to be the owner of an undivided one-half of the crop, "less nineteen tons thereof, due and belonging to A. Gregory." At the same time Gregory served similar notice, claiming nineteen tons on the ground that such quantity was sold to him before the attachment. Defendants produced evidence at the trial that the whole crop was only fourteen and one-half tons. The court found that plaintiff had no right or interest in the hay, or any part thereof, and rendered judgment for costs in favor of defendants Ham. Smith Leedom had made default.

The plaintiff seems to have modeled his procedure upon the law as declared in *Wright v. Ward*, 65 Cal. 525, 4 Pac. 534, and on the facts in evidence he was entitled to prevail. By their purchase at the execution sale the brothers Ham took the interest of Smith Leedom in the property, subject to the right of plaintiff to have the same applied so far as necessary in discharge of the partnership debts, and of any balance due to him as ascertained by an accounting: Civ. Code, sec. 2405; Freeman on Executions, sec. 254a. Respondents seek to uphold the finding of the court on the ground that by the notice served on the attaching officer plaintiff stated the ownership of the hay to be in a third person, and claim that such a conflict in the evidence was thus created as to render the finding conclusive on appeal. But the evidence made it clear that plaintiff, as terre-tenant under Gregory, had title to the crop, modified only by the partnership interest of Smith Leedom. Under authority from plaintiff, Gregory had bargained the hay to prospective purchasers, but there was no delivery, nor agreement for a present transfer, and hence no completed sale: Civ. Code, sec. 1140. Therefore, the declaration in the notice that Gregory owned nineteen tons of the hay was but a mistaken statement of opinion on the legal effect of prior transactions, and could not operate to divest title in the crop: *Keane v. Cannovan*, 21 Cal. 291, 301.

It is claimed, also, that such notice had the effect to estop plaintiff from subsequently asserting right to the hay. It is sufficient to say on this point that, since the notice stated that nineteen tons of the hay belonged to Gregory and one-half the overplus to plaintiff, it is impossible that the brothers Ham could have acted in good faith on the belief of the truth of this statement (Code Civ. Proc., sec. 1962, subd. 3), while causing the hay to be sold and purchasing the same as the property of Smith Leedom. The judgment and order denying a new trial should be reversed.

We concur: Searls, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order denying a new trial are reversed.

VAN VLECK v. BOARD OF DENTAL EXAMINERS OF CALIFORNIA et al.*

L. A. No. 162; March 29, 1897.

48 Pac. 223.

Board of Dental Examiners—Refusal to Indorse Diploma.—Act of March 12, 1885 (Stats. 1885, p. 110), relating to the practice of dentistry, creates a board of examiners, and provides (section 5) that, if the examination "prove satisfactory," the board shall issue to qualified persons certificates, and shall indorse as satisfactory diplomas from any "reputable" dental college, "when satisfied of the character of such institution," on the holder furnishing "evidence satisfactory to the board" of his or her right to the same. Held, that the duties of such board are judicial, and its action in finding an examination unsatisfactory, or refusing to indorse "as satisfactory" a diploma from a dental college, is final.

Board of Dental Examiners—Mandamus.—A Petition for a Writ of Mandate to the state board of dental examiners alleged that petitioner presented to the board a diploma issued to him by a certain dental college; that such college then, and when the diploma was issued, "was a reputable college, and there existed sufficient evidence of such fact"; that he furnished "evidence satisfactory" that he was the person named in the diploma, and that it was issued to him; that the board refused to indorse it; and that at the time the board "were satisfied" that such college was a reputable college. Held,

*Rehearing granted.

that such allegations were not the legal equivalent of allegations that the board found that petitioner furnished evidence satisfactory to the board that he was the person named in the diploma, and that the board was satisfied of the character of the institution issuing it.¹

APPEAL from Superior Court, Orange County; J. W. Towner, Judge.

Petition by John D. Van Vleck for a peremptory writ of mandate to the board of dental examiners of the state of California, and the individuals composing such board, to compel the issuance to petitioner of a certificate entitling him to practice dentistry. From a judgment granting the writ, and from an order denying a new trial, defendants appeal. Reversed.

W. F. Fitzgerald, attorney general, and W. H. Anderson, deputy attorney general, and J. W. Ballard for appellants; Knight & Harpham for respondent.

VAN FLEET, J.—This is a proceeding in mandate, commenced in the superior court, against the board of dental examiners of the state, and the individuals composing said board, to compel the issuance to petitioner of a certificate entitling him to practice dentistry, under the act of the legislature entitled "An act to insure the better education of practitioners of dental surgery, and to regulate the practice of dentistry in the state of California," approved March 12, 1885: Stats. 1885, p. 110. The court below gave judgment granting a peremptory writ, and defendants appealed therefrom, and from an order denying them a new trial.

Defendants demurred to the complaint or petition, upon the ground, among others, that it did not state facts entitling petitioner to the relief sought. The demurrer was overruled, and this ruling presents the only question which need be considered, since we are of the opinion the demurrer should have been sustained. The petition, omitting the formal parts and much immaterial and redundant matter, is, in substance,

¹ Cited in *Ex parte Whitley*, 144 Cal. 181, 1 Ann. Cas. 13, 77 Pac. 895, and there apparently denied authority for any purpose.

Cited in *Raaf v. State Board, etc.*, 11 Idaho, 718, 84 Pac. 36, to support the view that mandamus is not available to one aggrieved by the state board of medical examiners in refusing a license, within the discretion given it, its functions being judicial.

that petitioner is the holder of a diploma of graduation regularly issued to him on April 2, 1894, by the American College of Dental Surgery of Chicago, Illinois, after a course of study therein and an examination for graduation as prescribed by the regulations thereof; that, desiring to practice his profession in this state, petitioner, on the tenth day of May, 1894, in pursuance of said act, presented to defendants his said diploma, and demanded that they indorse the same, and issue to him a certificate to that effect; that when said diploma was issued, and at the time of the application to defendants, said American College of Dental Surgery "was a reputable college, and there existed and was at the command of defendants sufficient evidence of such fact"; that with his application petitioner furnished "evidence satisfactory to the defendants that he was the person named in said diploma, and that the same had been issued to him as stated in said diploma"; that defendants, "without any lawful right or excuse therefor, refused to indorse plaintiff's said diploma, or to issue to him the certificate provided for in said act." The act referred to, which underlies the proceeding, makes it unlawful for any person who is not at the time of the passage of the act engaged in the practice of dentistry to engage therein, unless he shall have obtained a certificate as hereinafter provided. It authorizes the appointment of a board of examiners, to consist of seven practicing dentists, "whose duty it shall be to carry out the purposes and enforce the provisions of this act." After providing for the constitution and organization of the board, and for the registration of all those practicing dentistry in the state at the date of its passage, it provides: "Sec. 5. Any and all persons who shall so desire may appear before said board at any of its regular meetings, and be examined with reference to their knowledge and skill in dental surgery, and if the examination of any such person or persons shall prove satisfactory to said board, the board of examiners shall issue to such persons as they shall find to possess the requisite qualifications a certificate to that effect, in accordance with the provisions of this act. Said board shall also indorse as satisfactory diplomas from any reputable dental college, when satisfied of the character of such institution, upon the holder furnishing evidence satisfactory to the board of his or her right to the same, and shall issue certificates to that effect within ten days there-

after. All certificates issued by said board shall be signed by its officers, and such certificates shall be prima facie evidence of the right of the holder to practice dentistry in the state of California." The further provisions of the act are not involved.

The contention of the attorney general, for appellants, is that the functions of the defendant board under the statute are judicial or quasi judicial, in that they involved the exercise of discretionary power—the determination of facts from evidence; that the determination of such facts is exclusively and finally vested in said board; and that, therefore, while mandate will lie to require it to act, should it refuse, it will not require it to proceed to a particular conclusion; nor where it appears, as the complaint alleges, that it has acted and reached one result, can it be coerced by this writ to act differently. The correctness of these principles, if such be the proper interpretation of the powers vested in the board, is conceded by respondent, but respondent contends that the act will not bear such construction. His contention, in effect, is that the power vested in the board is largely ministerial, or clerical merely; that, while the board has certain discretionary power to pass upon the facts upon which its action is to be based, its determination of those facts is not final; that if the evidence presented to it is such that, in the judgment of the court, the board should have found in favor of the existence of the facts authorizing it to indorse the certificate, it can be required to so find, and make such indorsement. We are unable to coincide with respondent's construction of the act. The whole theory upon which it proceeds, and the manifest purpose intended to be accomplished thereby, are against such construction. It is very evident, as indicated not only by the title, but in the body, of the act, that the inducing consideration moving the legislature to its adoption was the protection of the public against the ills suffered at the hands of incompetent quacks, empirics and other unqualified practitioners in this most important and essential branch of modern surgery and medical science. Until within a comparatively recent period, the practice of dentistry consisted of treatment largely, if not exclusively, of a mere mechanical nature, such as drawing, filling and cleaning the teeth; and practitioners of the art were neither required nor expected to know anything of the

pathological features or surgical necessities of those diseases which render their artisanship a necessity to man's relief and comfort. Indeed, the local dentist was frequently the village barber or leech, the watchmaker, or even the blacksmith—any artisan possessed of a convenient, if not suitable, instrument, and the necessary strength to pull a tooth. In more recent years, however, the necessity for a higher and special education in the art and science of treating the teeth has become widely and generally recognized, and has given rise to a distinct, honorable and numerous profession. Departments for the teaching of dental science and surgery have been added to the regularly established schools of medicine and surgery, while numerous special colleges of dentistry have sprung up. Many of the latter, unfortunately, as with similar institutions in other branches of learning, are more of a pretense than a fact; mere pseudo establishments, with an outward semblance of educational facilities and forms, but in reality but dishonest shams, gotten up to make money, by dispensing, for coin and without requirements of learning, pretended certificates and diplomas of graduation, which give the holder an apparent standing and character in his profession, to which he is not of right entitled. The evil resulting from this abuse has become so pronounced as to have received very general recognition, and there are now to be found in most of the states statutes intended for its correction. The statute under consideration is one of these. As expressed in its title, its purpose is "to insure the better education of practitioners of dental surgery; and to regulate the practice of dentistry." It provides a board composed of expert practitioners, with power to examine the license those who have not graduated elsewhere, and to investigate and pass upon the reputability of schools and colleges issuing certificates or diplomas, and the right of the holders of such diplomas to their possession. The powers thus conferred are broad and comprehensive, and in some respects, at least, must in their nature be final. The judgment of the board, for instance, as to the qualification of an applicant for license by examination, which is largely, if not wholly discretionary, must of necessity be conclusive: *Keller v. Hewitt*, 109 Cal. 146, 41 Pac. 871. No one would question this. Is the power to pass upon the reputability of a college, or the right of a holder of a diploma, intended to be less discretionary or final? There

is nothing in the language of the act in conferring the power to indicate it. The requirement is to "indorse, as satisfactory, diplomas from any reputable dental college, when satisfied of the character of such institution, upon the holder furnishing evidence satisfactory to the board of his or her right to the same." This implies quite as necessarily the exercise of judgment and discretion as in the examination of an applicant as to his fitness. It does not direct the board to act upon the presentation of certain specified evidence prescribed by the statute, but it requires the finding of the facts upon which their action is to be based from evidence which is to be "satisfactory to the board." If the statute required that the applicant make a prescribed showing in a particular manner, and that thereupon the board should indorse his certificate, it might with some reason be said that the act was more ministerial than judicial, and that, upon the prescribed showing being made, the board could not refuse to act. Such a case would be within the doctrine of *Wood v. Strother*, 76 Cal. 545, 9 Am. St. Rep. 249, 18 Pac. 766, and *Stockton & V. R. Co. v. City of Stockton*, 51 Cal. 328, relied on by respondent, where the action of the tribunal depended upon a certain event, and, that event being shown to have in fact occurred, the adverse determination of the tribunal whose duty it was to act was held not so far discretionary as to conclude the question; the true test, as held in *Wood v. Strother*, being whether the determination of the tribunal "is intended by law to be final."

But here the question whether those facts which are to move the action of the board have been shown does not depend upon some specified piece of evidence fixed by the statute, but upon such facts as will satisfy the board. The whole question, in other words, as to the facts, is committed to its discretionary judgment; and that its determination in such a case is conclusive, and not subject to the mandatory control of the courts, there can be no doubt. In *People v. State Board of Dental Examiners*, 110 Ill. 180, where the statute made it the duty of the board to issue a license to a "regular graduate of any reputable dental college" having a full course of lectures and instruction in dental surgery, mandamus was sought to compel the issuance of a certificate to one who alleged that he held a diploma from

a "reputable dental college," and that there was annually delivered at said college "a full course of lectures." In sustaining a demurrer to the petition, it is said: "Whether a college be reputable or not is not a legal question, but a question of fact. So, also, are the requirements in regard to the annual delivery of a full course of lectures and instruction. These questions of fact are by the act submitted to the decision of the board, not in so many words, but by the plainest and most necessary implication. Their action is to be predicated upon the existence of the requisite facts, and no other tribunal is authorized to investigate them, and, of necessity, therefore, they must do so. The act of ascertaining and determining what are the facts is in its nature judicial. It involves investigation, judgment, and discretion." And it was held that mandamus would not lie to control the discretion thus vested, and that no ground of relief was stated. Under a statute of Missouri providing for the issuance by the state board of health of a certificate to practice medicine to "all who shall furnish satisfactory proof of having received diplomas or licenses from legally chartered medical institutions in good standing," if the diploma be found to be genuine, and the person named therein be the one presenting it, etc., it was held that the board was vested with discretionary powers involving matters of judgment which could not be controlled by mandate; and that a petition alleging a state of facts which under the act should apparently entitle him to a certificate, but which showed that the application had been acted on by the board and denied, did not state a case for relief: *State v. Gregory*, 83 Mo. 123, 53 Am. Rep. 565. To the same effect are *Williams v. Dental Examiners*, 93 Tenn. 619, 27 S. W. 1019, and *State v. State Medical Examining Board*, 32 Minn. 324, 50 Am. Rep. 575, 20 N. W. 238. See, also, *Berryman v. Perkins*, 55 Cal. 483; *Jacobs v. Board*, 100 Cal. 121, 34 Pac. 630; *Fairchild v. Wall*, 93 Cal. 401, 29 Pac. 60.

The facts alleged do not bring the case within the doctrine of *Keller v. Hewitt*, *supra*, relied on by petitioner. In that case the board of education had examined Keller for a teacher's certificate, and, as alleged in the petition, had found that he was in all respects qualified, and in every way fit and competent, to receive a certificate; but the board had, nevertheless, determined not to issue it. We held that, upon

these facts, the writ would lie to compel the issuance of the certificate; that notwithstanding the board's discretionary power in determining the question of fitness, "where, under the law and their rules, the question of an applicant's fitness to receive a certificate has been determined in his favor, the limit of the board's discretionary functions in the premises has been reached, and a plain legal duty results." In the present case the tribunal has acted, and has determined against the petitioner. The allegations that the American College of Dental Surgery "was a reputable college, and there existed and was at the command of defendants sufficient evidence of such fact," and that petitioner furnished "evidence satisfactory to defendants that he was the person named in said diploma," are not the legal equivalent of an allegation that the defendant board have so found. In the language of the court in *People v. State Board of Dental Examiners*, *supra*, on this precise point: "The demurrer here does not admit that the board of dental examiners found that the college at which the relator was graduated was reputable, although it does admit that to be the fact. But, since the board cannot be compelled to decide the question that way, although the evidence might clearly sustain it in so doing, there is no ground for mandamus." It follows that the petition states no cause of action, and the judgment and order must be reversed, and the cause remanded, with directions to sustain the demurrer. It is so ordered.

I concur: Harrison, J.

GAROUTTE, J., Concurring.—I entirely agree with Mr. Justice Van Fleet as to the true construction of the legislative act here involved, but am compelled to dissent from the conclusion arrived at, to the effect that the petition does not state sufficient facts to entitle petitioner to the relief sought. At one stage of the proceedings the board of dental examiners has a pure ministerial duty to perform, viz., to indorse the applicant's diploma as satisfactory; and that stage of the proceedings is reached when the board is satisfied that the character of the institution issuing the diploma is that of a reputable dental college, taken in connection with the further condition that the holder of the diploma has also furnished "evidence satisfactory to the board of his or her

right to the same." If the holder of the diploma complies with these two demands of the statute, then I say there is nothing remaining for the board of examiners to do but to indorse the diploma as satisfactory—an act in no sense judicial, and one to compel the performance of which a mandate will issue. Eliminating from the allegations of the petition all immaterial matters, it still fairly shows a compliance with the two foregoing demands of the statute. It is alleged "that, at the time of making such presentation and demand, he (petitioner) furnished to defendants evidence satisfactory to the defendants that he was the person named in said diploma, and that the same had been issued to him as stated in said diploma." We also find the further allegation: "Plaintiff, on his information and belief, alleges that at the time defendants refused to indorse his said diploma and issue said certificate, that the defendants, as such board of dental examiners, were satisfied that said college was a reputable college." The latter allegation is strictly in accordance with the terms of the statute, and the former, by a fair and liberal construction, is also sufficient.

Although holding the petition satisfactory in law, still plaintiff's troubles are by no means over. Allegations of fact are not difficult to make. Proof of the facts alleged is the final test of a meritorious case. And here proof of facts to fill the measure furnished by the aforesaid allegations of the petition is wanting. In the answer to the petition, the board denied that it was satisfied that the college issuing the diploma was a reputable medical college, and also denied that satisfactory evidence was furnished to it that petitioner was entitled to said diploma. Upon these issues evidence was introduced, and, although findings of fact thereon were made in favor of petitioner, still in view of the construction of the statute, as declared in the main opinion, and in which construction I heartily concur, those findings of fact, as to one of the allegations at least, are without support in the evidence; and a reversal of the judgment necessarily results. The law delegated to the board of examiners the power to hear and determine certain facts, and its determination as to those facts was beyond review by the superior court. The question for the superior court to decide was not as to the correctness of the board's decision, but, rather, what did the board decide? The vitality

of petitioner's case is found in the two allegations I have quoted from his petition; and, under the evidence introduced at the hearing before the trial court, it is a certainty that the petitioner did not furnish the board evidence satisfactory to it of his right to the diploma presented. It therefore follows that, as to one of the imperative demands of the statute, petitioner failed in his proof, and the relief asked for must be denied. For these reasons, I concur in the judgment.

INGHAM et al. v. WEED et al.

L. A. No. 211; March 31, 1897.

48 Pac. 318.

Mortgage—Payment of Portion as Discharge.—Where One Who is Obligated, as between himself and a mortgagor, to pay a portion only of the mortgage debt, pays such portion, and afterward pays the balance due, the payment does not extinguish the mortgage as to such balance.

Mortgage Foreclosure.—The Assignee of a Mortgage, by an Assignment absolute on its face, may maintain an action to foreclose in his own name, though, by a collateral agreement, he may be bound to account for the proceeds to another.

Mortgage Foreclosure—Parties.—One Who has Transferred All His Interest in mortgaged property is not a necessary party to an action to foreclose.

APPEAL from Superior Court, Los Angeles County; Lucien Shaw, Judge.

Action by E. A. Ingham and R. D. List, trustee, against J. Irving Weed, James P. McCarthy, Edward McCarthy, the McCarthy Company, L. A. Thompson, W. E. Witter and G. P. Lyman, for the foreclosure of a mortgage. Judgment for plaintiffs, from which, and from an order denying a motion for new trial, defendants Weed, the McCartlys, and the McCarthy Company appeal. Affirmed.

H. H. Appel and McKeeby for appellants; Wicks & Wicks & Macdonald and H. T. Gordon for respondents.

BELCHER, C.—The plaintiffs brought this action to foreclose a mortgage, given to secure payment of two promis-

sory notes of which they were the assignees. They obtained a judgment and decree of foreclosure as prayed for, from which, and from an order denying their motion for a new trial, the defendants Weed, the McCarthys and the McCarthy Company, a corporation, appeal.

It appears from the record that prior to March 1, 1888, Edward McCarthy purchased the mortgaged premises from Charles E. Pittman and others. He paid part of the purchase money down, and gave to the sellers a mortgage for the balance. On March 1, 1888, this mortgage had been reduced, by payments made thereon from time to time, to \$15,000, bearing interest at the rate of ten per cent per annum. Prior to that time Edward McCarthy had made contracts with various parties, and, among others, with respondents Thompson, Witter and Lyman, to sell to them undivided interests in the said lands for prices agreed upon, to be paid in installments. On March 1, 1888, a written agreement was entered into between Edward McCarthy, as party of the first part, the respondents Thompson, Witter and Lyman and all the other contractors for undivided interests, as parties of the second part, and J. Irving Weed, as party of the third part. The agreement provided that the party of the first part should convey the whole tract to the party of the third part, in trust, to make sales and conveyances and to distribute the proceeds thereof according to the agreement. It conferred upon the trustee full power "to grant, bargain, sell and convey all or any portion of said land for such price and upon such terms as he shall deem best." And, as to his duties, it contained the following provisions: "It is further agreed that the trustee aforesaid shall receive and collect all moneys for sales of the land aforesaid, and pay all taxes, commissions, expenses of sale of all kinds, and improvements, authorized by the parties of the second part, and shall, on or before the first day of July, A. D. 1888, declare a dividend in favor of the second parties of any and all moneys in his hands, in proportion to the interests of the respective parties therein, as shown by the contracts with Edward McCarthy, aforesaid, and shall, out of said dividends, pay to Edward McCarthy the amounts due or to become due to him from second parties on said contracts; . . . and said trustee shall declare dividends and apply the proceeds in the same manner every

three months thereafter, until all the installments on said contracts have been paid, and all of said property shall have been disposed of. It is further understood and agreed that whereas there is now a mortgage on said property to the amount of \$15,000, with interest at ten per cent from March 1, 1888, of which Edward McCarthy has assumed the payment, that, in case it becomes necessary or expedient to change or renew said mortgage, the trustee shall, and he is hereby authorized to, execute such mortgage in his own name, and the amount received by said trustee from said second parties, or in their behalf, applicable to the installments due to Edward McCarthy, shall be applied to the liquidation of said mortgage, and shall be credited on the contracts of Edward McCarthy to second parties in the proportions to which they are respectively entitled thereto." Contemporaneously with the execution of this agreement, Edward McCarthy conveyed the land to Weed by a deed absolute on its face, the trust being expressed only in said agreement. Subsequently, the original mortgagees, the Pittmans, demanded payment of a part of the debt and the execution of a new mortgage to secure the balance. Charles McCarthy thereupon paid \$5,000 on their \$15,000 mortgage, thus reducing the indebtedness to \$10,000; and for that balance, on March 27, 1889, James P. McCarthy and Edward McCarthy executed to the Pittmans the two notes in suit, each for \$5,000, one payable one and the other two years after date, and the said McCarthys and the said Weed executed the mortgage in suit to secure payment of said notes. Weed never sold any part of said tract of land, as contemplated by the trust agreement; but on November 1, 1892, it being then deemed expedient by all the parties to terminate the trust, he conveyed to each of the beneficiaries an undivided interest in the property, equal to his share or interest therein, as follows: To Edward McCarthy, twenty-five fortieths; to L. A. Thompson, three-fortieths; to W. E. Witter, two-fortieths; to G. P. Lyman, two-fortieths; to Otto Freeman, two-fortieths; and to Andrew Glassell, six-fortieths. Subsequently the said interests of McCarthy, Freeman and Glassell were conveyed by them to the McCarthy Company, defendant, thus vesting in it title to thirty-three fortieths of the whole property. While the notes were held by the payees thereof, the Pittmans, payments of interest and princi-

pal, aggregating \$7,495.86, were made and indorsed upon them from time to time. Afterward the balance due on the notes was paid, mostly by the respondents Thompson and Witter, but in part by the plaintiffs; and thereupon, at the request of said respondents, the notes were assigned by the payees to the plaintiffs.

In support of their appeal, appellants contend that the plaintiffs cannot maintain this action to foreclose the mortgage for several reasons: First, because Thompson and Witter were bound by contract to pay off the mortgage, and did so, and it was then extinguished; second, because the plaintiffs have no interest, legal or equitable, in the notes and mortgage, but are acting simply as the agents of Thompson and Witter; third, because the deeds of the trustee to the several parties who had contracts for interests in the land were to be delivered only upon certain conditions, which were never complied with, and hence they were delivered without authority of the grantor, and passed no title to the grantees; fourth, because the only remedy of Thompson, Witter and Lyman was to file a bill for contribution against their associates in the transaction; fifth, because Charles McCarthy was a necessary party to the suit.

1. There is no evidence in the record showing, or tending to show, that Thompson and Witter ever personally undertook to pay the mortgage debt. They did not execute the notes or mortgage, and the only obligation resting upon them in this regard is that evidenced by the agreement of March 1st, to the effect that Weed, as trustee, might execute the mortgage, and might receive the amounts due from the parties of the second part on their contracts with Edward McCarthy, and should apply the same to the liquidation of the said mortgage. This at most created an obligation on the part of each of the parties of the second part to pay his proportion of the debt. But the evidence shows that Thompson, Witter and Lyman each paid his proportion of the debt, and then paid or caused to be paid the balance thereof. This did not extinguish the mortgage as to such balance, but left it a subsisting lien to secure its payment.

2. The evidence shows that each of the plaintiffs paid or obligated himself to pay a part of the money used to take up the notes from the Pittmans. But assuming it were otherwise, and that Thompson, Witter and Lyman paid to the

Pittmans the full amount due on the notes, and then had them assigned to the plaintiffs as their agents for collection, still the plaintiffs were not thereby deprived of the right to sue upon the notes and mortgage in their own names. The assignment vested in them the entire legal title, and they became the real parties in interest. Speaking upon this subject, Mr. Pomeroy, in his work on Code Remedies, (third edition, section 132), says: "It is now settled by a great preponderance of authority, although there is some conflict, that if the assignment, whether written or verbal, of anything in action, is absolute in its terms, so that, by virtue thereof, the entire apparent legal title vests in the assignee, any contemporaneous collateral agreement by virtue of which he is to receive a part only of the proceeds, 'and is to account to the assignor or other person for the residue, or even is to thus account for the whole proceeds, or by virtue of which the absolute transfer is made conditional upon the fact of recovery, or by which his title is in any other similar manner partial or conditional,' does not render him any the less the real party in interest. He is entitled to sue in his own name, whatever collateral arrangements have been made between him and the assignor respecting the proceeds. The debtor is completely protected by the assignment, and cannot be exposed to a second action brought by any of the parties, either the assignor or other, to whom the assignee is bound to account. This is the settled doctrine in most of the states"—citing authorities. And see, also, to the same effect, *McPherson v. Weston*, 64 Cal. 275, 30 Pac. 842; *Grant v. Heverin*, 77 Cal. 263, 18 Pac. 647, and 19 Pac. 493; *Toby v. Railroad Co.*, 98 Cal. 490, 33 Pac. 550.

3. That the deeds were executed by Weed with the consent of all the beneficiaries sufficiently appears from the evidence, and it also appears that they were in fact delivered to the grantees, and by them placed on record. And, so far as appears, no objection to the validity of any one of them, for want of delivery or other reason, was ever raised by any party until after the commencement of this action. Under the circumstances shown, it must therefore, in our opinion, be held that the delivery was sufficient to pass title to the grantees. See *Witter v. McCarthy Co.* (Cal.), 43 Pac. 969, *Thompson v. McCarthy Co.*, 43 Cal. 971, and *Lyman v. McCarthy Co.*, 43 Cal. 971 et seq., where the validity

of three of the said deeds was called in question, and upheld. But assuming that the deeds were not properly delivered, and that no title to undivided interests in the property was passed by them to the grantees, then the title to the whole property still remained in the grantor as trustee. No objection to the validity of the notes and mortgage is raised, and, under these circumstances, this action can and should be sustained as one brought against the holder of the legal title to the property and the several parties having beneficial interests therein under contracts of purchase.

4. If this action could not be maintained, then, clearly, the only remedy of Thompson, Witter and Lyman would be an action for contribution; but, as we have seen that the action can be maintained, it is enough to say that they should not be relegated to another action, but may rest on their rights in this one.

5. Was Charles McCarthy a necessary party to the suit? The law is well settled that only those persons are necessary parties to a foreclosure suit who have some beneficial interest in the mortgaged property or in the demand secured. It is true that McCarthy paid off \$5,000 of the \$15,000 mortgage, and some interest and expenses that had accrued; but subsequently he transferred all his interest in the property to others, and, at the time this action was commenced, that interest was, and still is, vested in the McCarthy Company. He had consequently no interest in or lien or claim upon the property or demand secured, and was therefore, in our opinion, not a necessary or proper party to the action.

The other points discussed by counsel do not require special notice. The judgment and order appealed from should be affirmed.

We concur: Searls, C.; Britt, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

IRISH v. PAULEY.

Sac. No. 160; March 31, 1897.

48 Pac. 321.

Logs and Logging—Delay in Performing Contract.—Under a contract to furnish logs to a mill, to be floated to the mill the next spring, if practicable, and, if not, then the spring following, where it is found that delivery the first spring was not practicable, a delivery the second fulfills the contract; and no damages are recoverable for the delay, or for the depreciation in value of the logs during the year.

APPEAL from Superior Court, Sierra County; Stanley A. Smith, Judge.

Action by John B. Irish against Benjamin Pauley on a contract. Judgment for plaintiff, from which, and from an order denying a motion for new trial, defendant appeals. Affirmed.

F. D. Soward for appellant; Frank R. Wehe and John B. Irish for respondent.

SEARLS, C.—Action upon a verbal contract to cut and deliver sawlogs at the sawmill of defendant, on the East Fork of the North Fork of the North Yuba river, county of Sierra. The cause was tried by the court without the intervention of a jury. Written findings were filed, upon which judgment was entered in favor of plaintiff for \$560 and costs. Defendant appeals from the judgment and from an order denying his motion for a new trial.

We have found but little aid from the statement of facts by the counsel for the respective parties in their briefs. The statement of each is predicated upon the evidence in his own behalf, and seems to ignore that of his adversary. As there was a substantial conflict in the evidence upon nearly all the issues in the case, and as the court below found in favor of the plaintiff, counsel for respondent is justified in assuming the facts to be in line with the testimony of his own witnesses.

The first point made for reversal is that "the decision is against law, as the judgment is based upon contradictory

findings." It is urged under this head that the third finding contradicts the sixth, and such others as find that plaintiff complied with all the conditions of his contract. To the better understanding of the finding assailed, and of some others to which similar objections are made, we give a synopsis of such of the findings as shadow forth an outline of the case. (1) In August, 1893, plaintiff and defendant entered into a verbal contract by which plaintiff agreed to cut and deliver at defendant's sawmill, on the East Fork of the North Fork of the North Yuba river, Sierra county, sawlogs containing from one hundred thousand to one hundred and fifty thousand feet of lumber; to be paid therefor, on delivery, eight dollars per one thousand feet. (2) The logs were to be cut into special lengths, of twelve, fourteen, sixteen, eighteen and twenty feet, and at such place that they could be floated down the East Fork to defendant's mill. They were to be floated in the spring of the year by water from the melted snow; and, if practicable, were to be floated in the spring of 1894, but, if not practicable, then in the spring of 1895. (3) In the spring of 1894 the plaintiff and defendant measured and counted the logs in the forest where cut, and found there were four hundred and seventeen logs, containing one hundred and forty thousand feet of lumber. Such measurement was not intended as a modification or change of the contract, under which they were to be delivered at the dam or boom of defendant. (4) In the spring of 1894 plaintiff made an effort to float and deliver the logs, but was unable to do so by reason of a snowslide which blocked the river, and which, after a reasonable effort, by blasting, etc., he was unable to remove. (5) In the spring of 1895 plaintiff delivered to the defendant, at his mill, one hundred thousand feet of lumber, in three hundred logs, and there then became due him \$800. (6) Plaintiff complied with all the terms of his contract, and defendant has paid nothing on account thereof except the sum of \$140. (8) The logs were, under the contract, fashioned according to the specifications furnished by defendant, and would not have been salable in the general market. (9) Defendant accepted the one hundred thousand feet of lumber. There are five more findings of fact, to which we will refer as occasion requires. We fail to see any conflict whatever between the third and sixth findings. The third is to the effect that in

1894 defendant measured and counted the logs, and found there were four hundred and seventeen logs, aggregating one hundred and forty thousand feet of lumber. The contract called for one hundred thousand feet to one hundred and fifty thousand feet of lumber, and when one hundred thousand feet was delivered the contract was satisfied. This being so, the fact that the logs, as measured and counted in the woods, consisted of four hundred and seventeen logs and measured one hundred and forty thousand feet, constituted no conflict. Plaintiff could comply with his contract by delivering anywhere from one hundred thousand feet up to one hundred and fifty thousand feet of lumber. The measurement of the logs in the woods was doubtless more convenient than in the dam or boom where they were to be delivered, and, had plaintiff succeeded in floating them all to the mill, it would have saved labor, nothing more.

It is further objected that finding 14, which is to the effect that plaintiff delivered no logs in 1894, but did deliver three hundred logs in 1895; that they were cut and prepared for delivery in 1894; and that by the delay in delivery they were injured to the extent of one dollar per thousand feet, etc.—is in conflict with finding 6 and a portion of finding 11, which are to the effect that such delay was no violation of the terms of plaintiff's contract. By the second finding it will be seen that the logs were to be floated in 1894, if practicable, and, if not, then in 1895; and the fourth finding shows that it was not practicable to so float them in 1894, and gives at length the reason therefor. We agree with the learned counsel for appellant that the injury to the logs by the delay is a false quantity, and immaterial, as it was not in violation of the contract, or by reason thereof that the injury occurred. The court deducted one dollar per thousand from the amount of the judgment on account of such injury. The judgment being upon the special contract, and not upon quantum valebat, this deduction was not called for. But, as the error was in favor of appellant, he cannot be heard to complain.

The question of the loss sustained by defendant by reason of not having logs to saw in 1894 cuts no figure in the case. Had defendant's theory, that the logs were, under the contract, to be delivered in 1894, been sustained, the loss by reason of a violation of the contract might have become an

important factor; but as plaintiff's theory, that they were to be delivered in 1894 or 1895, was upheld, and as he was found to have performed the contract fully on his part, there was no question of damages sustained by defendant, or profits lost by him, to be considered. The contention that only one hundred logs were delivered to and accepted by defendant is in conflict with the findings and evidence.

There are some other points made, but they have no more merit than those already noticed. We have carefully examined the evidence. It is conflicting, to the last degree, but is quite sufficient to sustain the findings of the court. We recommend that the judgment and order be affirmed.

We concur: Haynes, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

GNEKOW v. CONFER et al.

Sac. No. 234; March 31, 1897.

48 Pac. 331.

Mechanics' Liens—Personal Liability of Owner.—Code of Civil Procedure, section 1183, providing that a building contract shall be void if not filed with plans and specifications, and that in such case the labor done and materials furnished by all persons except the contractor shall be deemed to have been done and furnished "at the personal instance of the owner," and that the persons furnishing them shall have a lien for their value, does not create a contractual relation between the owner and subcontractor, whereby the owner can be held personally liable for such work and materials, but merely affords an opportunity for a lien by complying with the statute.

APPEAL from Superior Court, Shasta County; J. S. Beard, Judge.

Action by E. L. Gnekow against Saul Confer, Jr., and W. E. Hanks (copartners under the firm name of Confer & Hanks), and Masonic Building Association (a corporation). From a judgment in favor of the Masonic Building Association, plaintiff appeals. Affirmed.

Kile & Plummer, J. J. Paulsell and Thomas B. Dozier for appellant; Clay W. Taylor and J. Chadbourne for respondents.

SEARLS, C.—This action is brought to foreclose a mechanic's lien taken by plaintiff upon a building of the defendant the Masonic Building Association, to secure a balance of \$756 due on account of material furnished and labor performed upon a building described as the "New Masonic Building," situate in Redding, county of Shasta, state of California. The other defendants, viz., Confer and Hanks, who were the original contractors for the construction of the building, made default. The defendant the Masonic Building Association had judgment, upon the ground that the lien of plaintiff was not filed within the time prescribed by the statute, viz., within thirty days after the completion of the building. Plaintiff appeals from the judgment and the cause is presented on the judgment-roll.

Appellant acquiesces in the judgment refusing to enforce his lien, but insists that upon the findings he was entitled to a personal judgment against the corporation defendant for \$756, the amount of his claim. The findings show in substance as follows: (1) In the month of July, 1891, the corporation defendant entered into a contract with Saul Confer and W. E. Hanks, by which the latter agreed for \$25,000 to construct the new Masonic building or temple in the city of Redding, and work was commenced before the contract was recorded in the office of the county recorder, and is therefore void as against plaintiff. (2) About September 15, 1891, plaintiff entered into an agreement with Confer & Hanks to furnish tin for the roof of said building, gas and water pipes, water-closets, sinks, soil-pipes, etc., and to perform the labor of placing all of the material in place for \$1,956. Plaintiff completed his contract, and was paid \$1,200 on account thereof by the owner of the building, the corporation defendant. The residue of the findings relate to matters going to the validity of plaintiff's lien, but in no wise affecting the personal liability of the corporation defendant to plaintiff.

We think appellant's claim that he is entitled to a personal judgment against the corporation defendant cannot be upheld. Plaintiff was a subcontractor, who furnished material

and performed labor on the building for Confer & Hanks, who were the original contractors, and plaintiff occupied no contractual relation with the owner of the building, unless it was created under section 1183 of the Code of Civil Procedure, by a failure of the parties to record their building contract before work was commenced on the building. The effect of such failure is declared by section 1183, *supra*, to be that the contract shall be "wholly void, and no recovery shall be had thereon by either party thereto; and in such case the labor done and materials furnished by all persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof." When the law, in the contingencies mentioned in section 1183, assumes that labor is performed and material furnished "at the personal instance of the owner," it is simply for the purposes of the liens which it is the object of the statute to afford to those who perform labor or furnish material for the construction of buildings, etc. To accomplish this object, the statute creates under the circumstances, by its own force and vigor, such a relation for a specific purpose, viz., to uphold a lien, as will effectuate that purpose. The statute does not, however, create or attempt to create a contractual relation between the owner and a subcontractor upon which a personal action will lie. This question was involved in *McMenomy v. White* (decided by this court December 17, 1896), 115 Cal. 339, 47 Pac. 109, and it was said: "The owner, however, is not personally liable for labor done and materials furnished at the instance of the contractor, even though the contract be void, for the reason stated, the only remedy against the owner in such case being a foreclosure of the liens": *Southern California Lumber Co. v. Schmitt*, 74 Cal. 625, 10 Pac. 516; *Giant Powder Co. v. San Diego Flume Co.*, 78 Cal. 193, 20 Pac. 419; *Davies-Henderson Lumber Co. v. Gottschalk*, 81 Cal. 647, 22 Pac. 860; *Wood v. Transit Co.*, 107 Cal. 502, 40 Pac. 806. A subcontractor may have a personal action against the original contractor, but, as against the owner of the property, his relief is confined to a lien upon the property, and to a foreclosure and sale as provided by the statute. The case of *Morris v. Wilson*, 97 Cal. 644, 32 Pac. 801, relied upon by appellant, was one in which the original contractors had entered into

a contract with the defendant for the construction of a building. The contract was held void for want of filing, as required by section 1183, and that plaintiffs were not entitled to a lien, but were entitled to a personal judgment against defendant, the owner of the building. The personal liability there was based upon the contractual relation between the parties, which does not exist here as between the plaintiff and the corporation. The judgment should be affirmed.

We concur: Belcher, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

CLOUGH v. BORELLO et al.

Sac. No. 243; April 1, 1897.

48 Pac. 330.

Administrator—Frivolous Appeal from Appointment.—An appeal by a public administrator from an order denying his petition for letters on decedent's estate, and granting those of guardians of decedent's children, is frivolous; it not being contended that the guardians were not entitled to administer if the children were legitimate, and his petition having alleged that they were decedent's children and "heirs at law," and there being no evidence in the record of illegitimacy.

APPEAL from Superior Court, Merced County; E. W. Risley, Judge.

Petitions by A. G. Clough, Frank M. Borello and N. P. Justy for letters of administration on the estate of Giovanni Galliano, deceased. From an order denying the petition of Clough, and granting those of the others, he appeals. Affirmed.

T. C. Law for appellant; J. W. Knox and W. D. Crichton for respondents.

HAYNES, C.—In probate. A. G. Clough, public administrator in and for the county of Merced, petitioned the court for letters of administration upon the estate of Gio-

vanni Galliano, deceased. Respondents Frank M. Borello, as the guardian of the person and estate of Charles C. Galliano, a minor son of the deceased, and N. P. Justy, as the guardian of the person and estate of James Frank Galliano, also a minor son of the deceased, each petitioned the court to be appointed as administrator of said estate, and also filed written opposition to the appointment of appellant Abrana Galliano, as the surviving wife of said deceased, and mother of said children, also petitioned for letters of administration, but afterward withdrew her petition, and requested the appointment of one or the other of the said guardians. The several petitions and contests were heard together, and resulted in the denial of appellant's petition, and the making of an order appointing both of the guardians of said minor children as administrators of said estate, and from that order the public administrator appeals.

The record contains a bill of exceptions which sets out the various petitions and oppositions above mentioned, the withdrawal and request of the widow, and the order appointing respondents as such administrators, but does not contain the testimony of any witness, or set out any of the evidence given upon the hearing. Appellant's brief, however, is largely devoted to the question of the legitimacy of said minor children, based, of course, upon the asserted nonmarriage of the deceased and the mother of said children, Abrana Galliano; but, as the record before us gives no hint of the asserted illegitimacy of these children, that question cannot be considered here. On the contrary, appellant's petition for appointment alleges that these are the children and "the heirs at law of said deceased," and it is not alleged that there are any other heirs.

The sole question, therefore, is whether the guardians of these minor heirs are entitled to administration in preference to the public administrator. Next to the surviving husband or wife, or some competent person whom he or she may request to have appointed, the children of the deceased are entitled to letters of administration (Code Civ. Proc., sec. 1365); and section 1368 (amended Stats. 1893, p. 52) provides as follows: "If any person entitled to administration is a minor or an incompetent person, letters must be granted to his or her guardian, or any other person entitled to letters of administration, in the discretion of the court": See,

also, Estate of Wooten, 56 Cal. 326, and In re McLaughlin's Estate, 103 Cal. 429, 37 Pac. 410.

It is not contended on the part of appellant that said guardians were not entitled to administration if said children were legitimate, and, as appellant alleged their legitimacy by alleging that they were the children and "heirs at law of the deceased," the appeal is frivolous, and we recommend that the order appealed from be affirmed, with \$100 damages, and costs of appeal.

We concur: Searls, C.; Britt, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order appealed from is affirmed, with damages in the sum of \$100, and costs.

PONET v. WILLS et al.

L. A. No. 114; April 9, 1897.

48 Pac. 483.

Boundary.—The Findings of the Trial Court as to the Location of a division line will not be disturbed where the evidence is conflicting.

APPEAL from Superior Court, Los Angeles County; Lucien Shaw, Judge.

Action by Victor Ponet against William Le Moyne Wills and Charlotte Wills, in which there were findings and judgment for plaintiff. From an order denying their motion for new trial defendants appeal. Affirmed.

Geo. H. Smith and Smith & Winder for appellants; J. Brousseau for respondent.

HAYNES, C.—Action to quiet title. Findings and judgment were for the plaintiff, and defendants appeal from an order denying their motion for a new trial, upon the ground that the findings are not justified by the evidence.

Plaintiff and defendants own contiguous lots in the city of Los Angeles, fronting on Buena Vista street, formerly known as Eternity street. Said street runs nearly north

and south. Bellevue avenue, formerly known as Short street, crosses Buena Vista street at a point north of the premises in dispute, and plaintiff's lot lies on the north side of defendants' lot. Plaintiff alleges that defendants entered upon his lot in 1893, and erected a fence thereon parallel to his south side line, and eleven and two-tenths feet north thereof, and claim to own said land so fenced off from plaintiff's lot, or that they have some adverse interest therein. The sole question is as to the true location of the line between said lots. That the evidence in this case is conflicting is apparent from the briefs of counsel of the respective parties, as well as from the evidence contained in the record. An extended discussion of the evidence is, therefore, unnecessary. The lot now owned by plaintiff was conveyed by the city of Los Angeles to Carlos Cruz, July 11, 1868, by the following description: "All that certain piece or lot of land situated, lying and being in the city and county of Los Angeles, bounded and described as follows, to wit: Facing on Eternity street in said city sixty (60) feet and back in depth one hundred and sixty-five (165) feet; bounded north by Henry Bohring and south by city lands, as appears by a map made 8th July, 1868, by L. Seebold, deputy county surveyor." This conveyance was made upon the petition of Carlos Cruz, accompanied by said map, a copy of which is attached to the findings and to the complaint. This map shows that the south line of the Bohring lot, which is also the north line of the Cruz lot, is two hundred and forty-one feet south of the south line of Short street (now Bellevue avenue), and also shows a house upon the Cruz lot, the north side of which coincides with the north line of the lot. The answer alleges, and the court finds, "that defendant Charlotte L. Wills is the owner of lot 4, block E, of the Fort Hill tract, according to the survey of L. Seebold, made in July and August, 1868, and adopted as the official map No. 3 by the mayor and council of Los Angeles, November 17, 1868." Said lot was conveyed by the city to Jacob Hommel, December 29, 1884, the deed referring to said map made by Seebold last above mentioned. Appellants contend that these two maps were made by the same surveyor, from the same survey, and therefore the conveyances under which the parties respectively claim do not conflict; that respondent attempts to establish his case by measuring from the south line

of Bellevue avenue as it is now established, assuming that it is the same as the south line of Short street as it existed at the time of Seebold's survey; appellants further contending that the lines of Short street have been changed by the city council so that the south line of Bellevue avenue is now twenty and two-tenths feet farther south than the south line of Short street as shown by Ord's survey of 1849. This change is exhibited by a map made by A. Solano in 1894, put in evidence by appellants, purporting to show the lines of Short street by Ord's survey, also the lines of the same street according to a resolution of the council made in 1875, and the present lines of Bellevue avenue, which coincide with the lines fixed in 1875 so far as its intersection with the west line of Buena Vista street is concerned, though there is a material divergence as the lines of the street are extended westerly. It is apparent that from July, 1875, at least, the northeast corner of an adobe house situated at the southwest corner of Bellevue avenue and Buena Vista street marked the south line of Short street at its intersection with the west line of Buena Vista street; and if we assume that on July 8, 1868—at the time Seebold made the survey and map of the lot conveyed by the city to Carlos Cruz—the south line of Short street intersected the west line of Buena Vista street at the same point, the court below rightly found in favor of the plaintiff.

Upon this point the plaintiff called several witnesses, who gave testimony tending to show that there had been no change in the south line of Short street at its intersection with Buena Vista street since said survey and map were made. But the map made by Seebold for Carlos Cruz presents stronger evidence, if not of the true location of the south line of Short street as it existed in 1868, at least of the point which he took as the initial point of his survey, and which he assumed to be the south line of Short street; and, if said initial point can be determined, it must control, whether he was mistaken as to the location of the line of the street or not, as it will identify the precise boundaries of the land conveyed to Cruz. Upon said map Seebold marked a house, the north side of which coincides with the north line of the Cruz lot now owned by the plaintiff, and which is identical with the north line of the lot as marked in green lines upon defendant's Exhibit A, which, if correctly located, shows de-

fendants' encroachment of eleven and two-tenths feet. The house so marked by Seebold was, according to his survey, two hundred and forty-one feet from the point which he took as the south line of Short street. Mr. Botello testified that he had a faint recollection of that house; that it was built of wood, and was located about twenty-eight or thirty feet from the house in which his mother now lives. Applying the scale to Solano's map, we find the distance from the adobe house marked "Isabel Acuna" to plaintiff's north line, as designated by the green lines, to be thirty feet, and that line is two hundred and forty-one feet from the northeast corner of the adobe house which marks the south line of Bellevue avenue at its intersection with the north line of Buena Vista street. Mrs. Donaciana Reihm, who lives on the Bohring lot, testified that there was a house on the northeast corner of the Cruz lot, very near to the house in which she is now living; that it adjoined her lot, and was right on the line; and the house Cruz lived in in the seventies was there at the corner; that house has been torn down. That Cruz lived in the house at the northeast corner of his lot was also testified to by Emil Dubordieu, though there was testimony to the effect that Cruz lived in another house, near the south side of the lot. Mr. Botello also testified that he lived on the Bohring lot eleven or twelve years in a house which was a foot and a half or two feet on the Cruz lot. This house was not the adobe house in which his mother now lives. The witness called it a cottage. Solano's map shows a building abutting on the south line of the Bohring lot, but it is not designated by any name. Whether it is the cottage to which the witness refers, the record does not show, unless by inference. If that be the house mentioned by Mr. Botello, the blue lines on Solano's map, which purport to be made according to Seebold's survey, instead of cutting off "a foot and a half to two feet" of said house, cut off about eighteen feet. It is not probable that Seebold would show on the map he made for Carlos Cruz a house on the Cruz lot abutting the north line, when in fact the line cut off eighteen feet of a house on the Bohring lot, without noting that fact also. There is also evidence tending to show that a house was built on what was supposed to be the Cruz lot, near the south line; that it was burned about 1880, but that the excavation made for it is still visible, the greater part of which is between the

fence built by the defendant and the north line of plaintiff's lot as shown by the findings of the court. We think the evidence we have referred to is quite sufficient to sustain the findings, and the fact that it shows that Seebold must have taken the south line of Short street to be marked by the adobe house which now marks the south line of Bellevue avenue does not affect the case, even though the true south line of Short street was at that time twenty feet farther north. No other questions are discussed by counsel. We think that the order denying defendants' motion for a new trial should be affirmed.

We concur: Searls, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order appealed from is affirmed.

PEOPLE v. BELARDES.

Crim. No. 276; April 16, 1897.

48 Pac. 624.

Appeal—Credibility of Testimony.—The determination of a jury as to the credibility of testimony is not subject to review.

APPEAL from Superior Court, Los Angeles County; B. N. Smith, Judge.

Belardes was convicted of crime, and appeals. Affirmed.

A. A. Montana for appellant; W. F. Fitzgerald, attorney general, and H. E. Carter, deputy attorney general, for the people.

PER CURIAM.—The only question presented by the defendant in support of his appeal herein from the judgment of conviction is that the evidence was insufficient to justify the verdict of guilty. Without analyzing the evidence in its details, it is sufficient to say that the bill of exceptions shows that there was sufficient evidence presented to the jury to justify it in finding that the defendant had committed the crime with which he was charged. Whatever inferences might be drawn by the jury from the testimony of the wit-

nesses or from any discrepancy therein, or from any apparent conflict or inconsistency in their statement, was exclusively for the determination of that body. Their conclusion in these particulars is not subject to review in this court. The judgment and order are affirmed.

RHOADS et al. v. GRAY et al.

Sac. No. 312; May 13, 1897.

48 Pac. 971.

Appeal—Undertaking.—Where an Appeal is Taken from the Judgment, and also from the order denying a new trial, an undertaking which recites only that it was in consideration of the appeal from the judgment is ineffectual as to the appeal from the order.

Appeal—Time for Taking.—Under Code of Civil Procedure, section 939, providing that an exception to the decision or verdict on the ground that it is not supported by the evidence cannot be reviewed unless the appeal from the judgment is taken within sixty days after its rendition, the judgment must be affirmed where only ground urged on an appeal not taken within sixty days is that the evidence was insufficient to sustain certain findings of fact.¹

APPEAL from Superior Court, King County; Justin Jacobs, Judge.

Action by one Rhoads and others against one Gray and others. From a judgment in favor of defendants and from an order denying a new trial plaintiffs appeal. Affirmed.

Horace L. Smith for appellants; J. A. Hannah and M. L. Short for respondents.

PER CURIAM.—At the hearing of this cause the appeal from the order denying a new trial was dismissed for want of an undertaking upon such appeal, the \$300 undertaking for costs which was filed herein reciting only that it was in consideration of the appeal from the judgment: *Duncan v. Times-Mirror Co.*, 109 Cal. 602, 42 Pac. 147. The only

¹ Cited and followed, with other California cases, in *Sucker State Drill Co. v. Brock*, 18 N. D. 599, 120 N. W. 758, applying them as authority on a statute of North Dakota in close accord with that of California.

ground urged by the appellants in support of the appeal from the judgment is that the evidence was insufficient to sustain certain findings of fact; but, as the appeal was taken more than sixty days after the rendition of the judgment, we are precluded from the examination of that question: Code Civ. Proc., sec. 939. The judgment appealed from was rendered February 14, 1896, and the appeal therefrom was taken November 5, 1896. The judgment is affirmed.

MURPHY v. CITY OF SAN LUIS OBISPO et al.*

L. A. No. 273; May 20, 1897.

48 Pac. 974.

Municipal Bonds.—A City has No Power to Issue Bonds Payable in "gold coin of the United States" (in conformity with the ordinance submitting the matter to the voters, and the notice of election), instead, of in "gold coin or lawful money of the United States," as required by act of March 1, 1893 (Stats. 1893, p. 61).

Municipal Bonds.—The Term "Five Per Cent per Annum" in a municipal bond means that the interest is payable annually.¹

Municipal Bonds—Election—Ballots.—Under Statutes of 1889, page 399, section 2, authorizing a city to prescribe by ordinance the manner of holding a special election for the issuance of municipal bonds, an ordinance directing each voter to indicate his wish by "writing or causing to be written or printed 'Yes' or 'No' on the right-hand margin on his ticket, opposite the proposition on which he may desire to vote," is mandatory, and is not satisfied by stamping a cross opposite the word "Yes" or "No" printed after the proposition, as provided by the general election law, which the ordinance declares shall only be followed when not in conflict with said ordinance.

APPEAL from Superior Court, San Luis Obispo County; V. A. Gregg, Judge.

Suit by P. W. Murphy against the city of San Luis Obispo and others. From a judgment for defendants and from an

*For subsequent opinion in bank, see 119 Cal. 632, 51 Pac. 1085.

¹ Cited in Hollywood Union High School Dist. v. Keyes, 12 Cal. App. 175, 107 Pac. 131, and there stated to be without authority as law.

order denying a new trial plaintiff appeals. Reversed, and the judgment ordered for plaintiff.

Graves & Graves for appellant; W. H. Spencer for respondents.

CHIPMAN, C.—This is an action brought to enjoin the defendants from selling or disposing of certain bonds issued, but not yet sold, by the city of San Luis Obispo (one of the defendants), and to restrain defendants from levying the taxes mentioned in the complaint, and from enforcing a certain ordinance of the said city. The cause was tried by the court, and judgment given for the defendants. The appeal is from the judgment, and also from the order of the court denying plaintiff's motion for a new trial.

Appellant presents three grounds of attack upon the bonds in question: First, that the bonds are made payable in "gold coin of the United States" instead of "gold coin or lawful money of the United States"; second, that the question as to whether the interest on the bonds would be payable annually or semi-annually was not submitted to the voters; and, third, that the voters voting for said bonds voted by stamping a cross opposite the propositions submitted to them, instead of indicating their wish by writing "Yes" or "No" opposite the proposition they desired to vote for. The regularity of the proceedings of the city authorities is not drawn in question, except as these may relate to appellant's second and third points. By the act of March 1, 1893 (Stats. 1893, p. 61), it is required that the bonds and interest "shall be payable in gold coin or lawful money of the United States." The ordinance provided that both principal and interest shall be payable "in gold coin of the United States," and the notice of election was in that form. The contention of appellant is that the bonds should have been made payable "in gold coin or lawful money of the United States," and not in "gold coin" only. The argument is that, because the previous statutes authorizing the issuance of bonds (Act March 19, 1889, Stats. 1889, p. 399, and Act March 11, 1891, Stats. 1891, p. 94) were silent as to the kind of money in which the bonds might be made payable, and there was no restriction in this regard, therefore the amendment introducing a restriction was intended to limit the power and to com-

pel the proper authorities to insert the precise language of the statute, and all of it, to wit, "gold coin or lawful money of the United States"; and, not having done so, the bonds were void. Appellant relies upon *Skinner v. City of Santa Rosa*, 107 Cal. 464, 29 L. R. A. 512, 40 Pac. 742. The respondents reply that the intention of the statute was to leave with the municipality the option of making the bonds payable in either "gold coin" or in "lawful money of the United States." In the case of *Skinner v. City of Santa Rosa* the ordinance calling a special election to vote upon the bonds described them as serials, "payable in gold coin or lawful money of the United States," following the language of the statute. The notice of the election contained the same description of the bonds proposed to be issued. There were some features introduced about which other questions arose, not involved in this case. After the election, at which the vote was favorable to the issue, bonds were prepared in exact conformity to all the particulars stated in the notice; i. e., the bond was "payable in gold coin or lawful money of the United States." Steps were taken to sell the bonds, but, failing to find a purchaser in their then form, the city council passed another ordinance rescinding the former ordinance, prescribing the form of the bond, and changed the form in three particulars: (1) They were made payable at the Chemical Bank in New York City, instead of the place named in the notice. (2) They were made payable "in gold coin of the United States of America of the present standard of weight and fineness," instead of the statutory form, and as stated in the notice. (3) Interest was made payable semi-annually in like gold coin, instead of annually, as stated in the notice. The question presented and decided was, Has the assent of the voters been given to the proposed bond? One of the changes made was to make the bond "payable in gold coin of the United States of the present weight and fineness," whereas the voters had voted upon a bond "payable in gold coin or lawful money of the United States"; and the court said: "The kind of money in which payment must be made would influence any business man in determining whether he will favor his municipality incurring a debt for the payment of which, in common with others, his property is liable to taxation." The decision is based largely upon the proposition that the city council could not change the terms

of the submission after the vote was taken, but it also points strongly to the further proposition that the council must submit to the voters a bond in strict conformity to the statute, for it is said in the opinion that "the logical inference from the case above cited [referring to *Yealer v. City of Seattle*, 1 Wash. 308, 25 Pac. 1014] is that, as to all matters required to be submitted, such submission measures the authority of the common council." The opinion then calls attention to the fact that the law prior to 1893 was silent as to the kind of money in which payment should be made, but that by that latter act an amendment required that the bonds and interest "shall be payable in gold coin or lawful money of the United States; that before this amendment there was no restriction as to the kind of coin or currency; that the power to determine that question was as ample as that of a natural person to stipulate in what his personal obligations should be paid." The opinion then says: "The amendment must, therefore, have been intended to restrict that power, and this was done by expressly stating the kind of money in which alone they 'shall be' made payable." And it is added: "Whether the increased value of the bonds caused by the stipulation that they [referring to the Santa Rosa bonds] shall be paid in gold coin of the present standard of weight and fineness would equal or exceed any probable appreciation of gold cannot control the express provisions of the statute in that regard." The court holds, in conclusion, that, where the case arises before the bonds have been delivered, the city has no power to issue them in a form which does not substantially comply with the terms stated in the ordinance of submission and notice of election, and with the statute under which the proceedings were had.

In the case at bar the bonds are in conformity with the ordinance and with the notice of election, but they are not in the terms of the statute as to the kind of money made payable, and the question is, Do they substantially comply with the statute? It seems to me that to hold that they do would violate the reasoning upon which *Skinner v. City of Santa Rosa* rests. Respondent, with much force and reason, suggests: "That the plain grammatical and common-sense construction is that the city should choose between the two kinds of currency. It must adopt one or the other, but the wisdom as well as the expediency and responsibility of the

choice was left to the people themselves or their representatives. That they might deem it more advantageous to themselves, in seeking a market for their bonds, to pay in gold; and the legislature did not intend to deprive them of this advantage, or to substitute its judgment for theirs." This, it seems to me, is as strong a view as it is possible to present, and covers concisely the whole argument. But this is precisely what the legislature did when it passed the act in 1889, and later, when it was amended, in 1891, the municipality was left without restriction. If, then, the legislature so intended the law to remain, why did it amend the act in this very particular? We had the same kind of money in 1889 and 1891 as in 1893. In fact, all our money was of equal value, and no conceivable motive occurring to my mind could have actuated the legislature to introduce this amendment unless it was to provide against a possibility that the time might come when "gold coin" would have a different value from that of some other "lawful money of the United States." If "gold coin" and "lawful money of the United States" were terms importing money of equal, fixed and unchangeable value, there would have been no occasion for a change in the law. But, as this is not true, I can see a motive in so providing that the maker of the bonds should always have the option to pay in that money declared by the United States to be lawful money.

2. It is further contended that the question as to whether the interest on the bonds would be payable annually or semi-annually was not submitted to the voters, but should have been. I think the law was fully complied with in this particular. The term "five per cent per annum" means interest payable annually, and this is the form prescribed in the bond. There is no merit in this point.

3. Appellant objects further that the ballot used was a violation of the directions in the notice of election; that the notice required the voter to write the word "Yes" or "No" opposite the proposition he desired to vote for, whereas by the ballot voted he was directed in fact to stamp a cross. It was found by the court that two-thirds of the voters who voted at said special election voted said ticket by stamping a cross opposite the word "Yes" or "No," which was printed after the proposition on said ticket, and in no other way. Appellant says that this method of voting may be good under

the Australian ballot system, but, as that system applies to general elections only, not having been made applicable to a special election for the issuance of bonds, but, on the contrary, the city having by ordinance required the voters to indicate their wish by writing or causing to be written or printed "Yes" or "No," the election must be held to be void. Section 6 of Ordinance No. 76 prescribed the manner of holding the election, which was: "(1) As provided by law for holding elections in said city; (2) as provided by the general election laws of this state, except where such general laws may conflict with the state law for elections of the kind hereby called, or with this ordinance; and (3) as provided in this ordinance." The mode of voting for or against the indebtedness was prescribed in several particulars, size of paper, heading of ticket, etc., and, among other things, it was provided as follows: "Each proposition set forth in section 2 of this ordinance shall be voted on separately, and must be printed on such tickets as follows: '(1) Bonding for city waterworks, \$90,000. Bonding for sewer improvements, \$34,500.' Each voter shall indicate his wish by writing or causing to be written or printed 'Yes' or 'No' on the right-hand margin on his ticket, opposite the proposition on which he may desire to vote." It will be observed that the election was to be held as provided by law for holding elections in the city of San Luis Obispo, and as provided in the ordinance, and the general election law of the state was to be resorted to only (1) where not in conflict with the mode pointed out in the ordinance, or (2) where the general law did not conflict with the state law for elections of the kind called. Section 2, page 399, Statutes of 1889, prescribes the manner of procedure to call an election for the purposes named. It provides that the legislative branch of the city shall by ordinance "fix the day on which such special election shall be held, the manner of holding such election and the voting for or against incurring such indebtedness; such election shall be held as provided by law for holding such elections in such city, town or municipal corporation." The act of 1891, *supra*, made no change in this regard, nor did the act of 1893, *supra*. Appellant does not challenge the regularity of the proceedings, except in the single fact that the voter made known his wish by stamping a cross after the proposition, instead of writing his wish. The question pre-

sented is certainly one involving a clear departure from the provisions of the ordinance. It was plainly stated therein that "each voter shall indicate his wish by writing, or causing to be written or printed, 'Yes' or 'No' on the right-hand margin on his ticket opposite the proposition on which he may desire to vote." The general election law was to be applicable only when not in conflict with the ordinance. It seems to me that the board had no authority for changing the form of the ballot in the feature under consideration. I do not think that, in view of the ordinance, we are at liberty to fall back upon the Australian system, now embodied in our general law, for in the particular mentioned it is in direct conflict with the mandate of the ordinance.

The question, then, is, Was the ballot prescribed and voted such compliance with the ordinance as should be upheld by this court? It is true, as respondents suggest, that the words "Yes" and "No" were printed on the ballot opposite the proposition in separate lines, but can it be said that the voter printed them, or caused it to be done? It is true, the ballot is so formed that placing a cross opposite the "Yes" or "No" would convey the wish of the voter, because the ballot informs him that he is to so express his wish, and the operation is easy and simple. The question must, it seems to me, resolve itself into the one proposition: Was the method directed by the ordinance mandatory? In the case of *Lay v. Parsons*, 104 Cal. 661, 38 Pac. 447, the provisions of the so-called "Australian Ballot Law" were under review. Mr. Justice Van Fleet, speaking for the court, said: "The law requires the voter to mark his ballot by means of a stamp, by putting a cross opposite the name of each candidate thereon for whom he intends to vote. This provision of the law is, we think, mandatory, and no other method will satisfy it." In the case of *People v. Town of Sausalito*, 106 Cal. 500, 39 Pac. 937, where the same law was before the court, Mr. Justice McFarland said: "Appellant also contends that ballot 'F' should have been counted against incorporation; but it had no mark of any kind, except at the bottom, entirely below all the printed matter, it had the words 'Against Incorporation' written with a pencil, and was properly excluded. There is no provision for that method of voting except when one desires to vote for a candidate for office whose name is not on the printed list on the ballot. Under our present

election laws it is not enough to find out generally the intention of the voter (as it was under a former and simpler system). That intention must be expressed in the manner prescribed by the law, which has also other purposes, as the preservation of absolute secrecy," etc. In the case of *Tebbe v. Smith*, 108 Cal. 101, 49 Am. St. Rep. 68, 29 L. R. A. 673, 41 Pac. 454, the general election law again came under review. Mr. Justice Henshaw, speaking for the court, said: "It is the rule that mandatory provisions for the holding of an election must be followed, or the failure will vitiate it, while the departure from terms of a directory provision will not render it void in the absence of a further showing that the result of the election has been changed, or the rights of the voters injuriously affected thereby. But the rule as to directory provisions applies only to minor and unsubstantial departures therefrom. There may be such radical omissions and failures to comply with the essential terms of a directory provision as will lead to the conclusive presumption that the injury must have followed." Mr. Paine, in his work on Elections, says (section 497): "The disregard of directory requirements of law by voters or by officers of registration or election is not, in the absence of fraud, a sufficient ground for rejecting the entire poll of a precinct. But a violation by electors or officers of a mandatory requirement of law which changes or materially affects the result is, even in the absence of fraud, a sufficient ground for rejecting an entire poll when it cannot be purged. Statutes prescribing in affirmative language specific directions for electors or officers of registration or election are directory, unless the acts prescribed are in their nature essential to the validity of the election. Statutes expressly declaring specified acts or omissions fatal to the validity of an election, or expressly prohibiting the performance or omission of specified acts, are mandatory"; and he adds: "The most unimportant requirements may be made mandatory by a clear expression of the legislative will." In the case here it can hardly be said that the manner of indicating the voters' wish was unimportant, but, whether so or not, the ordinance did very clearly declare that "each voter shall indicate his wish in writing, or causing to be written or printed, 'Yes' or 'No' on the right-hand margin on his ticket opposite the proposition on which he may desire to vote." And how can we say that this is not

mandatory? Or how can we say that an election board could disregard this plain mandate and change the method so radically? Or how can we say that ballots marked with a cross opposite a printed "Yes" or "No" are the equivalent of ballots which the ordinance declared should have written or printed, or caused to be written or printed, on them by the voter himself the word "Yes" or "No"? Respondents cite several cases where official signatures made by the use of a fac-simile stamp were held to be good, and like cases, but they do not seem to me to involve the same principle as here. A case is cited also where the form of ballot prescribed was "For the Bonds" or "Against the Bonds," and a ballot was cast with the printed words upon it, "For the Bonds," with a line running through the word "for," and the word "Against" written under it, and it was held a valid vote against the bonds, citing *Clark v. Commissioners*, 33 Kan. 202, 52 Am. Rep. 526, 6 Pac. 311. This case is in harmony with others where the question alone is as to the intention of the voter, and where he scratches out a name and writes another in lieu of it, but it does not meet the case where an entirely different method than that prescribed by the statute is adopted for an entire ballot. I think the directions of the ordinance as to the manner of voting were mandatory, and should have been followed. In this view of the case a new trial could avail nothing, and it is therefore recommended that the judgment of the court below be reversed and judgment be entered for plaintiff as prayed for in the complaint.

We concur: Belcher, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is reversed and the court below is directed to enter judgment for the plaintiff as prayed for in the complaint.

PERKINS v. WEST COAST LUMBER CO.*

L. A. No. 160; May 21, 1897.

48 Pac. 982.

Counterclaim.—An Attorney Sued for Services Under a contract. Defendant claimed damages from negligent advice given by plaintiff before the contract was made, and not given in the performance of the services sued for. Held, that defendant's claim, being for unliquidated damages, should be pleaded, to be available, even though treated as a cross-demand, within Code of Civil Procedure, section 440, providing that "when cross-demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim could have been set up, the two demands shall be deemed compensated, so far as they equal each other, and neither can be deprived of the benefit thereof by the assignment or death of the other."

Counterclaim—Limitations.—Not Having Been Pleaded in the original answer, limitations ran against defendant's claim, till set up in an amended answer.

Counterclaim—Limitations.—The Trial Court's Failure to Find on issues presented by a counterclaim against which limitations have run is immaterial, where findings upon such issues could not have defeated the bar of limitations.

Trial.—A Concluding Finding That "All Other Averments in the pleadings herein and in issue, not comprised and passed upon in these findings, are not true," is improper, but is not reversible error, where the preceding findings are so full and specific, and so clearly cover all the material issues, as to rebut the suggestion of uncertainty.

APPEAL from Superior Court, San Bernardino County; John C. Campbell, Judge.

Action by C. J. Perkins against the West Coast Lumber Company. From a judgment in favor of plaintiff defendant appeals. Affirmed.

F. W. Gregg for appellant; Rolfe & Rolfe and Paris & Allison for respondent.

HAYNES, C.—This action is prosecuted by the plaintiff, an attorney at law, to recover for professional services rendered to the defendant under a special contract made June

*For subsequent opinion in bank, see 120 Cal. 27, 52 Pac. 115.

4, 1888, and for moneys paid out for the defendant at its request. Said contract fixed a monthly salary as a retainer, and for advice, etc., and provided that for his services in litigated cases he should have a reasonable compensation. This contract was terminated March 1, 1890. After deducting payments, and an account against the plaintiff for lumber, the court found there was due the plaintiff \$1,879.75, with interest thereon from the commencement of the action; and from the judgment entered thereon the defendant appeals upon the judgment-roll.

The principal question arises out of a counterclaim for damages pleaded by the defendant, wherein it was alleged, in substance, that in 1887 J. W. Newman, as contractor, agreed to erect for A. P. Clubine twelve frame dwelling-houses, for which Newman was to be paid, upon completion, \$8,200; that the buildings were completed on April 19, 1888; that the contract was not recorded until long after the work was commenced; that defendant furnished the contractor lumber to be used in the erection of said houses, and which was used therein, of the value of \$3,408.77; that on May 18, 1888, the plaintiff, as the attorney of defendant, advised it not to file a lien against said buildings for the material so furnished, as defendant would obtain the amount due it out of the foreclosure suit and lien judgment Newman would obtain in the foreclosure of his lien; that, at the time he so advised defendant, he knew that the contract was not filed for record in the recorder's office until long after the work was commenced; that Newman obtained judgment against Clubine May 16, 1888, but acquired no lien, because of the failure to file the contract in time, and that said judgment has not been paid, because of the insolvency of Clubine; and that Newman is insolvent. This action was commenced by the plaintiff on April 24, 1890, and this counterclaim was first pleaded July 21, 1894. And for the purpose of avoiding the statute of limitations the defendant further alleged that its cause of action for said damages arose out of the transactions set forth in the complaint; that, at the time said advice was given, defendant had no other legal adviser; and that it was agreed and understood at the time the contract of June 4th was entered into that it included the counsel and advice above mentioned, and that at the time the advice was so given a

formal agreement as to compensation should be made, and should include the advice so given. To this counterclaim the plaintiff pleaded that it was barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure. The court found that said advice was given, and that defendant was damaged thereby as alleged, but that no fee was charged by the plaintiff therefor, and that its cause of action was barred by the statute, which requires such actions to be brought within two years. Appellant contends that its counterclaim for damages is not barred by the statute; that said advice was given on April 17, 1888, two years and seven days before plaintiff brought suit, but that the advice was not legally injurious until the time expired within which the defendant might have filed his notice of lien, viz., May 20, 1888; and that this action was commenced by the plaintiff on April 24, 1890.

Upon the first trial of this case the defendant was permitted by the court to give evidence of its said claim for damages without having pleaded it, and recovered therefor, but on appeal by the plaintiff it was held that the finding of damages in favor of the defendant should be disregarded because not responsive to any issue in the case; "that even if it were conceded that the claim for such damage by defendant is a cross-demand, within the meaning of section 440 of the Code of Civil Procedure, it would still be necessary to plead it, under the circumstances of this case. It cannot be considered the debit side of the account sued on. It is an unliquidated demand for damages": *Perkins v. West Coast Lumber Co. (Cal.)*, 33 Pac. 1118. That it was necessary to plead defendant's claim for damages is conclusively settled by the former appeal, and, that being true, it follows that, not having been pleaded within the time limited by the statute, it was barred; such pleading, though made by the defendant in the action by way of counterclaim or cross-demand, being the commencement of an action therefor. We see no distinction between an amended answer which sets up a cross-demand against the plaintiff and an amended complaint setting up a new cause of action against the defendant, so far as the statute of limitations is concerned; and as to the latter the bar is determined by the date of the amendment, and not by the date of the commencement of the action: *Anderson v. Mayers*, 50 Cal. 525; *Atkinson*

v. Canal Co., 53 Cal. 102. It is argued by appellant, however, that plaintiff upon the former appeal made the point that said damages were barred, and that, if this court had been of that opinion, it would have said so. But that question was not before the court upon the record, and its silence cannot be construed as a decision of the question.

Appellant's further contention that the court failed to find upon material issues presented by said counterclaim cannot be sustained. As was held upon the former appeal, it was necessary to plead defendant's demand for damages, even if such cross-demand were within the meaning of section 440 of the Code of Civil Procedure; and, as the bar of the statute must be determined by the date at which such demand is pleaded, it is obvious that, if all the allegations of the sixth paragraph of said counterclaim had been specifically found by the court to be true, it would not avail to defeat the finding that its claim for damages was barred, and in view of that finding it is immaterial whether the wrong advice which caused the damage was given under, or was embraced within, the special contract of June 4, 1888, or not.

It is also contended that the judgment must be reversed because of the sixteenth finding, which is as follows: "That all other averments in the pleadings herein and in issue, not comprised and passed upon in these findings, are not true." We do not see why this so-called finding was made. We have discovered no material issue which is not covered by the specific findings, nor are we pointed to any supposed omissions to find, except those already noticed. This, however, is not a finding upon any issue, but it finds that "all averments in the pleadings" not covered by the preceding findings, whether made by the plaintiff or defendant, are not true; and, if not true, they could not be the basis of any specific finding in favor of either party against the other which could affect the judgment. Such statements, however, are suggestive of uncertainty, and are therefore mischievous, and should not be encouraged. We do not think this finding will justify a reversal of the judgment. The preceding findings are so full and specific, and so clearly cover all the material issues, as to rebut the suggestion of uncertainty; and in this respect we think this case may be distinguished from *Harlan v. Ely*, 55 Cal. 344, *Bank of Woodland v. Treadwell*,

55 Cal. 380, and other cases cited by appellant. We advise that the judgment be affirmed.

We concur: Belcher, C.; Britt, C.

PER CURIAM. —For the reasons given in the foregoing opinion the judgment is affirmed.

IN RE MEADE'S ESTATE.

S. F. No. 753; May 27, 1897.

49 Pac. 5.

Appeal by One Who has not Previously Appealed.—A person whom the record shows to be a party aggrieved may appeal, though he has not previously appeared in the case.

Attorney—Presumption of Authority to Appear.—On Appeal it will be presumed that appellant's attorney had authority to appear for him, from the mere fact that he assumes to do so.

APPEAL from Superior Court, Santa Clara County; John Reynolds, Judge.

Appeal from an order in the matter of the estate of Euthanasia S. Meade, deceased. On motion to dismiss the appeal. Denied.

Charles Clark for appellant; Nicholas Bowden for respondent.

PER CURIAM.—This is a motion to dismiss an appeal, in which the moving party denies the right of the appellant to appeal, and the right of the attorney who gave the notice as attorney for appellant to act as such. Affidavits were filed showing that the appellant had never appeared in the probate court at all, and, of course, had no attorney of record. It does appear, however, from the record, that the appellant is a party aggrieved by the order.

We must presume that the attorney had authority to appear for and represent the appellant, from the mere fact that he assumes to do so. A person whom the record shows to be a party aggrieved may appeal, although he has not previously appeared in the case. We will not consider upon this mo-

tion whether the alleged will was such, or did, if probated, confer any rights upon appellant. These points involve the merits of the appeal. Motion denied.

WILLEFORD v. BELL.

Sac. No. 151; May 28, 1897.

49 Pac. 6.

Mining Claim—Location.—If One First Discovering a Vein or lode does not make a valid location thereon, another may make such location.¹

Mining Claim—Distinctly Marking.—Location of a mining claim is invalid if not "distinctly marked on the ground, so that its boundaries can be readily traced," as required by Revised Statutes of the United States, section 2320.²

Mining Claim—Proof of Notice.—It Being Provided by Revised Statutes of the United States, section 2324, only what "all records of mining claims . . . shall contain," it is not necessary, in the absence of local rules or customs, for one asserting a location to prove the notice posted on the claim, but merely the recorded notice, which he may do by a copy.

Witnesses—Cross-examination.—Permitting a Witness to be Asked on cross-examination whether he had not, at the adjournment after his examination in chief, made a certain statement to a certain person, if error, is harmless, there having been no attempt to prove that his answer, "No," was not the truth.

Evidence—Waiver of Objection.—Objection That Evidence was inadmissible, not having been made when it was offered, is waived.

APPEAL from Superior Court, Placer County; J. E. Prewett, Judge.

Action by C. A. Willeford against A. O. Bell. Judgment for plaintiff. Defendant appeals. Affirmed.

¹ Cited in note in 139 Am. St. Rep. 162, on discovery of mineral in mining claims and rights of locators prior thereto.

² Cited and followed in Holdt v. Hazard, 10 Cal. App. 445, 102 Pac. 541, where the court say a judgment for the possession of a mining claim is not void for uncertainty of description, if the description "is in accordance with the notices posted, which constitute a part of the markings of the claims, which, taken with other data contained therein, is sufficient to enable one to identify the property with reasonable certainty."

B. F. Myres and Ben P. Tabor for appellant; John M. Fulweiler for respondent.

BELCHER, C.—This is an action to quiet the plaintiff's title to a quartz-mining claim, which is described by metes and bounds, and as being fifteen hundred feet long and six hundred feet wide, and called the "Starlight Quartz Mine." The complaint is in the usual form, averring that the plaintiff is the owner and in possession of the said mine, and that the defendant claims some right, interest and estate therein, but that he has no such right, title, interest or estate whatsoever. The defendant by his answer, disclaims having any right, title, claim or interest in or to the land described in the complaint, except to so much thereof as is included within certain described boundaries, and called the "Northern Light Mine." The boundaries mentioned are six courses, extending from a fixed starting point to the place of beginning, and having the following lengths: 268.6 feet, 956.3 feet, 263.3 feet, 249.5 feet, 995 feet, and 288.4 feet. He then denies that plaintiff is, or ever was, the owner, in the possession or entitled to the possession of any portion of the said Northern Light Mine; and avers that he is, and at all the times mentioned in the complaint was, the owner of, in the possession of, and entitled to the possession of, all that portion of the premises described in the complaint, which is included within the boundaries of the said Northern Light Mine. Wherefore he prays that plaintiff take nothing by his suit, and that he have judgment for his costs.

At the commencement of the trial, on demand of defendant, a jury was impaneled to try special issues, and the following questions were submitted, and answers returned: (1) "Which party (if either) was the first to discover a ledge, vein or lode bearing gold in the premises in question?" Answer: "Defendant." (2) "Did the plaintiff and his co-locators discover a ledge, vein or lode bearing gold, within the limits of their claim, before making their location?" Answer: "Yes." (3) "Did the defendant, Bell, at any time before February 28, 1895, mark his location on the ground so that its boundaries could be readily traced?" Answer: "No." (4) "Did the defendant, Bell, prior to the location of plaintiff, discover a ledge, vein or lode bearing gold within the limits of this claim?" Answer: "Yes."

After these answers were returned, and before judgment, defendant moved the court to disregard the second and third findings of the jury, upon the grounds: (1) That the second finding is inconsistent with the first and fourth findings, and is not sustained by the evidence; (2) that the third finding is not sustained by the evidence, but is contrary thereto. The court denied the motion, and thereupon made and filed its findings of the facts involved in the case as follows: That both plaintiff and defendant were native-born citizens of the United States, and as such qualified to locate and hold mining claims on the public mineral lands of the United States. "That on the twenty-seventh day of February, 1895, the plaintiff discovered what was called by him the Starlight quartz ledge, lode or vein bearing gold, within the limits of what is mentioned and described in the complaint as the 'Starlight Quartz Mine.' That on the twenty-eighth day of February, 1895, the plaintiff and his colocators located the said Starlight Quartz Mine by posting notices thereon, claiming fifteen hundred linear feet of the lode and surface ground as set out in complaint, and distinctly marked the said mining claim on the ground so that its boundaries could be readily traced, and entered into the possession thereof. That prior to the twenty-seventh day of February, 1895, the defendant discovered a quartz lode or vein bearing gold on the land within the limits of what is now called the 'Starlight Quartz Mine,' and which defendant called the 'Northern Light Mine,' which said lode or vein is presumed to be the same lode or vein thereafter discovered and located by the plaintiff. That between the tenth and fifteenth days of August, 1894, the defendant posted a notice on the south-westerly end of what he called the 'Northern Light Mine,' near what he presumed to be the ledge, claiming fifteen hundred linear feet of the ledge and six hundred feet in width on each side of the middle of the lode, but the defendant did not distinctly mark the said claim on the ground, so that its boundaries could be readily traced, either at the time of posting said notice or at any time prior to the twenty-eighth day of February, 1895, or before the plaintiff located the said Starlight Quartz Mine." And as conclusions of law the court found that on the twenty-eighth day of February, 1895, the plaintiff was, and ever since has been, the owner, in possession and entitled to the possession, of the quartz-mining

claim described in the complaint; that the adverse claim of defendant in and to the said land and premises was without any right whatever; and that plaintiff was entitled to have his claim and right to the said premises quieted as against the defendant. A judgment and decree was accordingly entered as prayed for, from which, and from an order denying his motion for a new trial, defendant appeals.

The land in controversy is public mineral land of the United States, and both parties claim it under locations made by them, or attempted to be made, under and in accordance with the provisions of the United States statutes. No local rules or customs were shown to exist, and the principal question is, Was the defendant's location, which was prior in time to plaintiff's, sufficient to meet the requirements of the law? The statute provides, among other things, that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located" (U. S. Rev. Stats., sec. 2320); and also that: "The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim": U. S. Rev. Stats., sec. 2324.

1. Appellant contends that the findings of the jury and court as to the discovery of the vein or lode by the plaintiff before making his location, and as to the failure of the defendant to distinctly mark his location on the ground so that its boundaries could be readily traced, were not justified by the evidence, and hence his motion for new trial should have been granted. Without reviewing and setting out the testimony bearing upon these questions, we deem it enough to say that the evidence introduced and relied upon by the plaintiff was, in our opinion, quite sufficient to justify and sustain the findings complained of. And, though this evidence conflicted with that introduced by defendant, the well-settled rule in such cases must control in this court. It should be noted, however, in this connection, that the notice of location posted and filed for record in the county recorder's office by defendant was not so drawn as to afford any assistance to one seeking to trace out the boundaries of the

location, since it stated that defendant had located and claimed "fifteen hundred linear feet along the course of this lead, lode or vein of mineral-bearing quartz, and six hundred feet in width on each side of the middle of said lead, lode or vein," etc., while the location, as described in the answer, was less than one thousand feet long and less than six hundred feet in width.

2. Appellant further contends that during the progress of the trial the court committed several errors of law which were prejudicial to his side of the case. The first point made under this head is that the court erred in refusing to disregard the second finding of the jury, upon the ground that it was inconsistent with the first and fourth findings. Waiving the question whether, under the issues raised by the answer, the verdict of the jury was merely advisory to the court, and could be adopted or disregarded at its pleasure, or whether it could only be set aside on motion for new trial, still we fail to see any irreconcilable inconsistency in the findings referred to. The fact that defendant "was the first to discover a ledge, vein or lode bearing gold on the premises in question," and that he made this discovery "prior to the location of plaintiff," was not inconsistent with the fact that plaintiff and his coloeators discovered "a ledge, vein or lode bearing gold within the limits of their claim before making their location." Both parties may have discovered the same lode, but in different places; and the testimony tended to show that they did so discover it. Under the statute it can make no difference which party made the first discovery, so long as it was in fact made before plaintiff made his location. Besides, appellant was not aggrieved by the finding complained of, since, though he was the first to discover the lode, he failed to make a valid location thereon, and left it subject to location by any other competent person.

The next point is that the court erred in giving to the jury an instruction which reads as follows: "The jury are instructed by the court that the mining claim of the defendant, in order to be valid, must have been distinctly marked upon the ground so that its boundaries could be readily traced, on or before the twenty-eighth day of February, 1895. The law requires this marking of the claim upon the ground to be done in such a manner that any person of rea-

sonable intelligence may go upon the ground, and readily trace the claim out, and readily find the boundaries and limits of the claim without instructions, advice or information from anyone or thing other than the marking upon the ground, and it is not necessary or required that such a person shall have a copy of the notice of location or necessarily use it in the tracing the boundaries of the claim, but where such notice is posted upon the claim, and constitutes a part of the marking of such claim upon the ground, it may be used as a part of the means by which the boundaries of the claim can be traced; and if you believe from the evidence that the defendant prior to the twenty-eighth day of February, 1895, failed to so mark his claim upon the ground so that any person of reasonable intelligence could go upon the ground, either with or without a copy of the notice of location, and readily trace the claim out, and find its boundaries and limits, your verdict should be to the effect that his claim was not so marked on the ground that its boundaries could be readily traced." We see no error in the instruction as given. It seems to state the law applicable to the question in hand quite clearly and correctly.

The next point is that the court erred in overruling defendant's objection to the introduction in evidence of a copy of plaintiff's recorded notice of location, as a copy of the notice posted on the claim, upon the ground that the original should have been produced, or its loss or destruction shown. It was admitted by counsel for defendant that plaintiff's location was properly staked out, and it was proved that the notice was posted on the claim, and recorded. The statute provided only as to what "all records of mining claims hereafter made shall contain," and, as no local rules or customs were shown to exist, it was not necessary to introduce or prove the posted notice. It was proper, however, to prove the recorded notice, and for that purpose the copy was offered and received; and in this there was clearly no error.

The next point is that the court erred in admitting certain evidence offered by the plaintiff in rebuttal. The evidence objected to tended to contradict to some extent the evidence introduced by defendant to show his prior discovery of gold in the ledge or lode in controversy. We think the evidence offered was admissible in rebuttal, and that the objection to it was properly overruled.

The next point is that the court erred in allowing plaintiff to introduce evidence for the purpose of impeaching Benjamin Bell, a witness for defendant. The witness had testified as to the discovery of gold in the Northern Light Mine, and the location thereof by defendant. A day or two later he was recalled, and asked by counsel for plaintiff if he did not, immediately after the adjournment of court upon that day, at a time and place named, make a certain statement to Mr. J. W. Bigelow, and answered, "No, sir." He was then asked if he did not, right away after the adjournment, make a certain statement to Mr. Willeford. To this last question counsel for defendant objected, upon the ground that it was irrelevant, immaterial and not in cross-examination, and was an attempt to impeach the witness in regard to an immaterial and collateral matter. The court overruled the objection, and the witness answered, "No, sir." Afterward, in rebuttal, plaintiff called Bigelow as a witness, and proved by him, without any objection or exception, so far as the record shows, that Bell did make the statement to him which he had denied having made. In all this we see no material error. There was no attempt to prove that Bell did not answer truly as to the statement which it was assumed he had made to Willeford, and, if the evidence sought to be elicited as to the statement made by him to Bigelow was deemed inadmissible, it should have been objected to at the time it was offered. No such objection having been made, the point that it was inadmissible cannot now be considered.

The other points raised and discussed by counsel do not require special notice. The judgment and order appealed from should be affirmed.

We concur: Searls, C.; Britt, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

WIESTER v. WIESTER.*

S. F. No. 552; May 29, 1897.

48 Pac. 1086.

Partnership—Good Faith in Dissolution and Liquidation.—Under Civil Code, sections 2410, 2411, partners are bound to act in the highest good faith toward each other, and this continues and extends to the dissolution and liquidation of the partnership affairs.

Partnership—Fraud in Settlement of Affairs.—Where, on settlement of a partnership, the withdrawing partner accepted certain land in payment of his interest at \$70 per acre, the deed will not be set aside, on the ground of fraud in the settlement, where it was evident that both parties believed the land to be of such value, that it was located at a distance, at a town in which there was at the time a "land boom," and similar property was then selling at from \$100 to \$150 per acre.

APPEAL from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by William C. Wiester against William H. Wiester. Judgment for defendant and plaintiff appealed. Affirmed.

G. R. Lukens (H. A. Melvin of counsel) for appellant; Denson & De Haven for respondent.

SEARLS, C.—This is an action to obtain a decree annulling a deed of conveyance by defendant to plaintiff of the undivided one-sixth interest in and to about four hundred and eighty acres of land situate in the county of Pacific, state of Washington; to have it determined that plaintiff has an interest in the firm of Wiester & Co., which on August 1, 1890, was of the value of \$7,000; that defendant be decreed to have received said interest in said firm under a trust for the use and benefit of plaintiff; that defendant be held to account therefor, etc. The cause was tried by the court without a jury. Written findings were filed, upon which judgment was entered in favor of the defendant. Plaintiff appeals from the judgment and from an order denying his motion for a new trial.

*Rehearing denied.

The findings are too lengthy to be set out in full. The following will convey an idea of their drift: On the 1st of August, 1890, and for some four years prior thereto, plaintiff and defendant were partners in business in San Francisco; the former owning one-fourth and the latter, who was his uncle, three-fourths interest in the business. Plaintiff was in bad health, and wished to retire from the business. He asked his uncle, the defendant, to buy him out. The latter wished to retain plaintiff in the business, but finally consented, and they determined that plaintiff's interest was of the value of \$7,000. Defendant had no ready money to pay, but had the note of plaintiff for \$1,600, given when plaintiff bought into the business, and owned four hundred and seventy-nine and two-fifths acres of land near South Bend, county of Pacific, now in the state of Washington, which cost him \$2,000 some five or six years previously. Neither party had ever seen the land, and all their information in regard to it came from telegrams and letters from other persons. A "land boom" was on at South Bend, a railroad and other improvements were in course of construction, and land values were rapidly enhancing. Defendant believed, from newspapers, letters, etc., that his land was worth from \$70 to \$100 per acre, and that he could in a short time sell it for the latter figure. Plaintiff, who knew as much of its value and prospects as defendant, proposed taking an interest in the land in payment for the remainder of his interest in the store after deducting the amount of the note. The parties agreed to this, and plaintiff accepted an undivided one-sixth interest in said land in full payment of the balance due him, and received a deed therefor. In this deal the land was reckoned at \$70 per acre. The court finds that the land was at that time of the value of \$50 per acre, and is now of the value of \$10 per acre. At and prior to this transaction the parties were on very intimate terms of mutual friendship, confidence and respect, which conditions existed up to about the time of the commencement of this suit. Defendant took no advantage of plaintiff by reason of their relationship or business or terms of friendship in the said transaction, and "did not make any false or fraudulent representations whatever to the plaintiff concerning the said land, or the character, location, situation, condition or value thereof, and the said transaction was made

without any deceit or fraud, and without any intent on the part of the defendant to cheat, wrong, deceive or defraud the plaintiff," nor was he fraudulently prevailed upon to dispose of his interest in the partnership business by any false or fraudulent representations, etc., "and it is not true that he (plaintiff) has been imposed upon nor fraudulently prevailed upon by any false or fraudulent representations whatever."

Appellant objects to the sufficiency of the evidence to support each of the more important facts as found by the court. The form of the objection, in every case except one, is that "there is no evidence that," etc., followed by the substance of the finding. The exception is where plaintiff avers that "there is no evidence sufficient to produce conviction that the value of the said lands in suit at the time of the said transaction was \$50 per acre." The position assumed by the learned counsel for appellant is: (1) Plaintiff and defendant were blood relations, between whom the most intimate and confidential relations existed. (2) They were partners, and, under sections 2410 and 2411 of the Civil Code, they were trustees for each other, and bound to act in the highest good faith toward each other, and not to obtain any advantage in the partnership affairs by the slightest misrepresentation, concealment, threat or adverse pressure of any kind, and that this status continued and extended to the dissolution and liquidation of the partnership affairs. (3) That, as the evidence is largely documentary, being contained in the depositions of witnesses, the opportunities of this court to judge of its value are as good as those of the court below, and hence that the general doctrine that we will not interfere in a case of substantial conflict of evidence has no application.

We have perused the evidence in the light of these confidential relations between the parties, and from that standpoint find nothing to warrant a reversal of the judgment. If defendant became liable to plaintiff at all, it was for representing the value of the land at \$80 per acre at the time of the sale, either knowing it to be less or not knowing it to be worth as much as that sum. We think the evidence was sufficient to warrant the court in finding, not only that the defendant believed his statement as to the value of the land, but that it was literally true at the time.

Upon the first branch of the proposition the evidence shows that defendant had a brother in law named Dennis, who was in the employ of the Northern Pacific Railroad, and located at Tacoma or in that region. About April 18, 1890, Dennis wrote to defendant, for a would-be purchaser of defendant's land, offering \$12 to \$20 per acre therefor, if properly located and valuable for agriculture, etc. Dennis accompanied this letter with another, in which he stated he had private information to the effect that a railroad was to reach the coast in that vicinity, a town to be built, boomed, etc.; that defendant's land was worth \$60 per acre; and, among other things, said: "But if I cannot sell your South Bend tract for \$60, my name is not Dennis," and "This much I feel confident of, that I can sell it for \$50 per acre within sixty days." He advises defendant "to hold it, even if you could get \$60 per acre." About April 25th Dennis telegraphed defendant from Tacoma: "Don't sell any price until hear from me. North tract worth half a million if located right." In May, 1890, defendant requested a traveling salesman of his firm, who was going north, to look after the land, and report to him. He telegraphed to defendant that the land was worth \$200 per acre. There is nothing to indicate but that full confidence was placed in these reports by defendant.

As to the evidence of the value of the land on August 1, 1890, the date of the sale to plaintiff, there were the depositions of five witnesses, residents of the vicinity, and familiar with prices in 1890, who placed the value of the land at from \$75 to \$150 per acre. Some of these witnesses fortified their opinions of value by describing sales and offers made to purchase lands in the vicinity, but somewhat nearer to the new town, at prices greatly in excess of the value fixed by them on this land. On behalf of plaintiff some seven witnesses were offered, who generally fixed the value of the land at from \$5 to \$10 per acre; but it is quite apparent that most of them speak of the value in the present rather than in the past, and a number of them say, in substance, that all prices above those fixed by them were fictitious, related not to intrinsic value, were the effect of a boom, etc. One of them, the manager of a large lumber company, owning large tracts of land, did say: "I consid-

ered all property unimproved in South Bend worthless at that time, and do so consider it now, as the town has three sets of bonds on it, and would have more if anybody would take them." The same witness, however, admitted that his company in 1891 sold forty acres of land adjoining the town for \$15,000, one-third cash, balance in one or two years. He added that the balance was never paid. In 1890, ninety-eight acres in the section adjoining the land of defendant was sold for \$10,000, half cash, balance in two years, etc.

Under this state of the evidence, the court would have been, as we think, warranted in finding a higher value of the land than that fixed. Conceding that, in a case like the present, where the testimony as to the value of the land is largely contained in the written depositions of witnesses, we are in as good a position to pass upon its weight and character as the court below, and we still think the findings, and each of them, are correct, and supported by the weight of evidence. There are no errors of law calling for reversal or requiring comment. We recommend that the judgment and order appealed from be affirmed.

We concur: Chipman, C.; Britt, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

TAGGART v. BOSCH.

L. A. No. 189; May 29, 1897.

48 Pac. 1092.

New Trial.—An Order Denying a New Trial for Insufficiency of the evidence will not be disturbed where there is a material conflict in the evidence.

Witnesses—Cross-examination.—On an Issue as to the Genuineness of the note in suit, plaintiff testified that it was made by defendant for part of the price on sale to him of an interest in a mine by plaintiff and his partner. Plaintiff's testimony in chief was confined to the execution, delivery and nonpayment of the note. On cross-examination he testified that he did not tell his partner on the day of the sale of having taken the note, though they executed the deed together, but told him some time later; whether a week later or two or three months he could not say. Held, that further cross-exam-

ination as to how soon after the sale he saw his partner was erroneously excluded.

Witnesses—Cross-examination.—In Such Case, There was No Direct Testimony as to the genuineness of the note, except plaintiff's affirmance and defendant's denial thereof. Plaintiff's partner was ordinarily engaged at the mine, and plaintiff might not have seen him for some months after the sale. The partner testified that he heard of the note the next time after he saw plaintiff, but could not say when that was. Three and a half months after the sale of the mine, plaintiff bought defendant's interest in a liquor business in which they were partners, and, to make the cash payment, borrowed a large sum at the bank, exhibiting the note in suit, which was for \$3,000, as one of the securities offered. In addition to the cash payment, plaintiff gave his own notes to defendant for \$1,500, nothing being said about the note in suit. Plaintiff's explanation was that he did not want to do anything to interfere with the trade, and that one-half the note in suit belonged to his partner in the mining business. His explanation of not having told his partner of the note was that their relations were confidential, each doing about as he pleased. The consideration named in the deed of the mine to defendant was \$500, and plaintiff testified that the actual consideration was \$250 and the note. Plaintiff's partner testified that he understood the consideration to be \$250 or \$350. Two witnesses testified that defendant told them that it was \$250. The expert testimony was equally divided as to the genuineness of the note in suit. Held, that the erroneous exclusion of the cross-examination of plaintiff as to when he next saw his partner after the sale of the mine was prejudicial.¹

Witnesses.—It was Error to Exclude Cross-examination of plaintiff as to whether he had private accounts between himself and defendant, and whether he told the bookkeeper in a liquor business in which they were partners about the note.

Instructions.—Alleged Error in Instructions Given and in Refusing other instructions cannot be considered in the absence of exceptions to the giving and refusal.

APPEAL from Superior Court, Los Angeles County; Clark, Judge.

Action by Joe P. Taggart against John D. Bosch. Judgment for plaintiff, and from an order denying a new trial defendant appeals. Reversed.

¹ Cited and followed in Harrold v. Territory of Oklahoma, 169 Fed. 52, 94 C. C. A. 415, the court saying in the same connection that it is only after the right of cross-examination has been substantially and fairly exercised that the court has discretion to cut off further questioning of the adverse witness.

John S. Chapman and Del Valle & Munday for appellant; Diehl & Chambers, R. H. F. Variel and Goodrich & Garrison for respondent.

HAYNES, C.—This action is upon a promissory note alleged to have been made and delivered by the defendant to the plaintiff on August 8, 1890, for the sum of \$3,000, payable one year after date, with interest at seven per cent. The answer denies that defendant made, signed or delivered said note. The pleadings are verified. A jury trial was had, and resulted in a verdict for the plaintiff, upon which judgment was entered. This appeal is from an order denying defendant's motion for a new trial.

The specifications upon which the motion for new trial was heard are: (1) Insufficiency of the evidence to justify the verdict; (2) errors in ruling upon questions of evidence; and (3) that the court erred in giving certain instructions to the jury, and in refusing to give other instructions requested by defendant.

1. The sole question at issue upon the pleadings was whether the defendant made the note sued upon, and upon that question the evidence was conflicting. The plaintiff testified that he saw the defendant sign the note, and that, immediately after it was signed, the defendant delivered it to him; that it was made and delivered in the private office of Taggart & Bosch, no one else being present; that it was made and delivered August 8, 1890, the day of its date; that it was given in part consideration for the sale of an undivided one-sixth interest in an antimony mine to the defendant, the whole consideration of which was \$3,250, viz., the note in suit for \$3,000, and \$250 in money, paid a few days after the sale; and that one J. K. Patton was equally interested with him in the mine, and in the sale of said interest. The defendant testified as positively that he did not give the plaintiff said note; that he did not sign it; that the signature thereto is not his; that he first heard of said note sometime in the fall of 1891, after this suit was commenced, while he was in Leipsic, in Germany, and first saw it after his return from Europe, sometime in June, 1892. If we ended our recital of the evidence at this point, it would certainly appear that there was a material conflict. Experts were called by the plaintiff, who testified, from a comparison

of the signature to the note with other signatures of the defendant which were admitted to be genuine, that, in their opinion, the signature to the note was the genuine signature of the defendant, and about an equal number were called for defendant, who testified that, in their opinion, the note was not signed by the defendant. It is evidently not necessary to review and discuss the testimony given by these witnesses, nor to rehearse the able arguments of counsel for appellant as to the weight which should be given to such evidence, for, whichever way we might conclude the preponderance to be, the conflict remains, not only as to such evidence, but to the direct evidence given by the parties as well. Other testimony was given by the parties and by other witnesses, which should be stated in connection with the second point made by appellant; but it may be said in advance that it does not remove the conflict so as to permit us, under the well-settled rules of decision long and uniformly adhered to in this state, to reverse the order denying defendant's motion for a new trial, upon that ground, whatever may be our opinion as to the preponderance of the evidence.

2. Appellant contends that the court erred in certain rulings during the trial. Plaintiff and defendant were co-partners in the wine and liquor business from August, 1887, to November 25, 1890. On August 8th, defendant purchased said interest in said mine, and on that day the plaintiff and his co-owner of the mine, J. K. Patton, executed and acknowledged a deed to the defendant for said interest, both the grantors acknowledging its execution at the same time before the same notary in Los Angeles (where plaintiff and defendant had their place of business) on the same day said promissory note is claimed by the plaintiff to have been made by the defendant. Said mine is situated, as appears from the deed, in San Bernardino county; and Patton, who had been for some years associated with the plaintiff in mining enterprises, was the mining man, and attended to that part of the business, and was much of the time, perhaps usually, out of town. The execution and acknowledgment of the deed, however, showed that he was in town the day the note was made, if made at all, and the plaintiff testified that he and Patton went together to the notary, and acknowledged it, and that he did not then inform Patton that he had sold said interest for \$3,250, or that he received or

was to receive a note for \$3,000. The consideration named in the deed was \$500. The testimony of the plaintiff, in chief, was confined to the execution and delivery of the note, and that it had not been paid. Upon cross-examination he testified that the note was given in part consideration for an interest in the "Blue Jay Mine." He was then asked: "Where is that Blue Jay mine situated?" An objection that the question was incompetent, irrelevant and immaterial, and not proper cross-examination, was sustained, and an exception taken. The witness then testified that the consideration of the sale was the note in suit and \$250 in cash, and that the sale was of an interest in a mine which he and Patton owned, and the sale was made by him and Patton, and that he did not know where Patton was at the time the note was delivered. Plaintiff was then asked by counsel for defendant: "How soon after this sale did you see him?" The same objection was made and sustained. Counsel for defendant then stated: "I want to show that Mr. Patton was in ignorance of the existence of this document; that he was a co-owner with Mr. Taggart of this mine; and that he knew nothing about the existence of the note for some months after that. We take an exception." Counsel then asked the witness: "When did you next see Mr. Patton?" The same objection and the same ruling were made, and an exception noted. "Q. Did you ever tell Mr. Patton about getting this note? A. Yes, sir. Q. When? A. Some time following. Q. How soon after? A. It may have been a week, or it may have been two or three months, I couldn't state now (it is four years ago) just exactly when I did tell him. I told him though. Q. Didn't you state to the court, upon the trial of this cause before, that it was in November? A. I may have said so; yes, sir." In reply to further questions, the witness said he did not tell Patton that he had received or was about to receive a note for \$3,000 besides the \$250 "that day" (the day the deed was executed), nor while the "transaction was going on," and that the bookkeeper of Taggart & Bosch was R. M. Sharp. "Q. Did you tell him about this note?" Same objection and same ruling. "Q. You had private accounts between yourself and Bosch?" Same objection and same ruling and exceptions were taken.

These rulings may be considered together, as they all involve the same question of law, viz.: Were they proper questions to be put upon the cross-examination of the plaintiff? The issue of fact being tried was whether the defendant made the note which was the basis of the action. The plaintiff alleged in his complaint, and had testified in chief, that the defendant signed and delivered it. The answer denied specifically that he signed or delivered it. It did not allege new matter by way of defense, but challenged the plaintiff to prove the averments of his complaint. If he failed to prove that defendant signed and delivered the note, judgment would necessarily be for the defendant, without any evidence being offered on his part; and the only question before the jury was the truth or falsehood of plaintiff's allegation. It was held in *Jackson v. Water Co.*, 14 Cal. 18, that a cross-examination cannot go beyond the subject matter of the evidence in chief, but should be allowed a very free range within it; that, where the defendant on cross-examination simply aims to disprove by the witness the very cause the witness himself has made, the rule excluding such evidence until defendant opens his case has no application: See, also, *Harper v. Lamping*, 33 Cal. 647, 648; *People v. Lee Ah Chuck*, 66 Cal. 667, 6 Pac. 859; *Wixom v. Goodcell*, 90 Cal. 623, 27 Pac. 419; *McFadden v. Railway Co.*, 87 Cal. 464, 11 L. R. A. 252, 25 Pac. 681. A witness may be asked any question upon cross-examination which tends to test his accuracy, veracity or credibility, and the court should be especially liberal where the witness is a party to the suit: *Neal v. Neal*, 58 Cal. 287; *Greenleaf on Evidence*, sec. 446. That the court erred in the above rulings is apparent; and it is equally well settled "that every error is *prima facie* an injury to the party against whom it is made, and it rests with the other party clearly to show, not that probably no hurt was done, but that none could have been or was done, by the error": *Jackson v. Water Co.*, 14 Cal. 25; *Carpentier v. Williamson*, 25 Cal. 167; *People v. Ybarra*, 17 Cal. 167, 172; *Rice v. Heath*, 39 Cal. 609; *Cleary v. Railroad Co.*, 76 Cal. 240, 18 Pac. 269.

The further question is therefore presented, viz.: Does it appear from the record that the defendant was not injured by the restrictions imposed upon the defendant in his cross-examination of the plaintiff? The case is peculiar, at least

so far as the consideration of the evidence is concerned. But two persons, the plaintiff and defendant, know of their own personal knowledge whether the note in suit is genuine or is a forgery. It is one or the other. The plaintiff swears that it is genuine, that it was signed by the defendant in his presence, and was immediately delivered to him. The defendant as positively swears that it was not signed or delivered by him. No witnesses were called to testify to the reputation of either of the parties for honesty or veracity, yet the veracity of the two men who alone knew the truth must be determined by the jury before a verdict could be rendered. The burden of proof was upon the plaintiff, and, to enable him to recover, the evidence must preponderate in his favor. Under such circumstances, the conduct or declarations of the plaintiff, as to all matters or circumstances which tended to weaken or destroy his direct testimony that the defendant did execute and deliver the note, were competent and proper subjects upon which to cross-examine him, and a full and unrestricted cross-examination within the limits hereinbefore stated was, under the circumstances, of the utmost importance to the defendant.

It is contended, however, by the learned counsel for respondent that the facts called for by the questions which were disallowed were subsequently disclosed in evidence, or were unimportant and immaterial and harmless, and that, therefore, the defendant was not prejudiced. The location of the Blue Jay mine was shown by the deed, but the questions, "How soon after this sale did you see him?" and, "When did you next see Mr. Patton?" were not answered, nor the facts called for disclosed. The plaintiff testified that Patton went with him to acknowledge the deed, but "couldn't say whether this was before or after the giving of the note. It was about the same day." He further testified that he did not tell Patton about the note that day, but did tell him some time after; that it might have been a week or two or three months; and that he may have testified before that it was in November. It also appeared that Patton was in charge of the mines out on the desert, and it might be that plaintiff did not see him until November, and that he told him the first time he saw him. But it might be the case that he saw him the next day or the next week after the date of the note, or every day or every week from that time

until November. The jury may have inferred from the ruling of the court upon these questions that whether the plaintiff had frequent and early opportunities of informing his co-owner in the mine of the existence of the note did not affect the probability of its existence, and that, therefore, the fact that he did not tell him sooner, or the fact that he did not tell him at all, if that were so, would not affect plaintiff's credibility. The plaintiff, however, realized that some explanation of his conduct in this particular was necessary, and, upon his redirect examination, gave, as a reason for not telling Patton of the note, that their relations "were very confidential"; that Patton did as he pleased over on the desert, and he did the same at his end of the line, and that was why he didn't tell him; that "I never made any explanations to him or he to me." The witness could not have meant that he "never" explained his transactions in relation to their common property to his co-owner, else he would never know what plaintiff did; but in all this explanation of their "very confidential" relations he gave no intimation as to how soon he saw Patton after he received the note, nor when he next saw him. It certainly cannot be contended that the silence of plaintiff in regard to this note would not be more significant if he saw Patton immediately after the time he swears he received it, or saw him within a few days, or frequently between that and the time he did tell him.

But other facts disclosed in the testimony show still more clearly the materiality and importance of these questions. The plaintiff and defendant were partners in the liquor business at the time of this transaction, and had been for three years preceding. On November 25, 1890, about three and one-half months after defendant bought said interest in the mine, defendant sold his interest in the firm of Taggart & Bosch to the plaintiff for \$6,500, of which the plaintiff paid \$5,000 in cash, and gave defendant his two several promissory notes—one for \$1,000, payable January 1, 1892, and the other for \$500, due July 1, 1892. The cash payment was made by plaintiff's check on the First National Bank of Los Angeles. In order to make the cash payment, plaintiff borrowed \$4,000 from said bank, and, when negotiating the loan, exhibited the note here in suit to the cashier as one of the securities he had on hand, and, so far as appears, said cashier, Mr. Shaffer, is the first person, aside from

the parties to the note, who ever saw it. In buying out the interest of Mr. Bosch in the store, the plaintiff did not mention to him the existence of this note, though he showed it to Mr. Shaffer as part of his "securities," nor ask the defendant to accept it as part of the cash payment, nor even to accept a credit upon it to the extent of \$1,500, for which sum he gave his own notes. Plaintiff gave as reasons for not mentioning this note to the defendant at the time he purchased his interest in the store that the relations of the parties had become strained; that their negotiations had culminated in a "give or take" proposition, made about 5 o'clock in the evening, and limited to 12 o'clock the next day; that it was important that the business should not be interrupted, and he did not want to call up anything that might interfere with his trading on the partnership business at that time, and, "besides, Patton equitably owned one-half of said note." Plaintiff had inserted in the deed the consideration of \$500, which would make the value of the mine \$3,000. He had testified that the real consideration was \$3,250, which would make the value of the mine \$19,500. He had taken the note in his own name, and had presented it to the bank as one of his securities, and as constituting, in part at least, the basis of his credit. He had borrowed \$4,000 from the bank, to enable him to make a cash payment of \$5,000 to the man whose note he held for \$3,000, and, in addition, gave his own notes for \$1,500, without mentioning defendant's note, because, as he testified, "I did not want to call up anything that might interfere with my trading on the partnership business at that time. Besides, James K. Patton equitably owned one-half of said note." The record gives no hint that at that or any other time there had been any dissatisfaction on the part of the defendant with his purchase of said interest in the mine. The defendant could not have forgotten that less than four months before he had given the plaintiff his note for \$3,000, and no reason appears why a reference to this note should interfere with the purchase of defendant's interest in the store if the note was in fact made by the defendant. On the contrary, it is not reasonable to suppose that defendant would want to accept plaintiff's notes for \$1,500, while the plaintiff held his note for \$3,000, which might be transferred before maturity, and which he could be compelled to pay to the holder, though the con-

tingencies of business might make the notes he held against the plaintiff wholly uncollectible. Nor does Patton's interest in the note present a satisfactory explanation of the problem. It had not prevented him from using it as his own in obtaining a loan from the bank, and, besides, his "confidential" relations with Patton were such that no "explanations" were ever required or made by either of them, and hence he was at liberty "to do as he pleased at his end of the line." But, if it were otherwise, there could be no reason why he should not, instead of making his own notes for \$1,500, have surrendered defendant's note, and taken a new note from him, payable to Patton for \$1,500; and thus have utilized his own interest in the note, and at the same time satisfied his conscience as to Patton's interest. If the circumstances surrounding and following the sale of said interest in the mine for the price and upon the terms claimed by the plaintiff, and his subsequent conduct, had been consistent with such claim, thus relieving him from involved and improbable explanations, these questions, which were excluded, as to how soon after the sale he saw Patton, and as to when he next saw him, would seem to be of trifling importance; and if from the whole of the evidence it would be clear that, however they might have been answered, the result of the case would not have been affected, the presumption of injury from the erroneous ruling would have been overcome; but when, as here, the answers to these questions might have increased the improbabilities of the transaction as testified to by the plaintiff, and compelled additional explanations, the difficulty of making which is usually increased with each recurring necessity, we cannot regard the error as harmless.

We need not enlarge upon the rulings made upon the questions put to the plaintiff as to whether he told the bookkeeper about the note, and whether private accounts were kept between plaintiff and defendant. They were neither so remote nor related to matters so improbable as to justify their exclusion. The general effect of these rulings was to improperly restrict the cross-examination of the plaintiff. We are not authorized to infer that, if these questions had been permitted, the cross-examinations upon those lines would have stopped with the answers to them, but that it would have been pursued so long as the answers would indi-

cate that it was proper or profitable. "The power of cross-examination has been justly said to be one of the principal, as it certainly is one of the most efficacious, tests which the law has devised for the discovery of truth. . . . It is not easy for a witness who is subjected to this test to impose on a court or jury; for, however artful the fabrication of falsehood may be, it cannot embrace all the circumstances to which a cross-examination may be extended": Greenleaf on Evidence, sec. 446. And where it is evident, as it is in this case, that there is absolute and unqualified falsehood upon the one side or the other, no restriction upon a proper cross-examination of either of the parties who alone have personal knowledge of the fact in issue can be said to be harmless, unless shown to be so by other evidence, and that does not appear.

We have not space to discuss the remaining evidence in detail, but a brief reference to some of it must suffice. The deposition of Patton was taken and read by the defendant. He testified that he did not recollect what the price was. He was then asked: "Didn't you tell me the other day what he paid? A. Well, I told you, I think, it was \$250, and Bosch told me \$350, and I told him I forgot all about what it was. Q. When Bosch told you \$350, he meant a hundred dollars that was sent for assessment work? A. It was all put back in the mine. It was all put in the mine, including the assessment money. Q. You are quite positive it was not over \$350? A. As my understanding was, I don't, no." As to what the witness meant by his last answer we will not speculate. He further testified that he first heard of the note "the next time after I saw Mr. Taggart." He could not say how many months after, nor whether Mr. Bosch had gone to Europe, nor whether it was after Bosch had sold out to Taggart, nor whether it was five months or five days. Mrs. Bosch and T. R. Bennington testified in substance that plaintiff told each separately that he sold said interest in the mine to Bosch for \$250, and Charles Kohler testified that plaintiff told him he had sold Bosch said interest for \$250, and offered to sell him another one-sixth for \$350. Plaintiff denied having told either of said witnesses that he sold said interest to Bosch for \$250, and that he had no recollection of offering Kohler any interest in the mine for \$350, or for any sum. Some circumstances were also shown upon

the cross-examination of said witnesses tending to weaken their testimony; and as to defendant it appeared that in a deposition given by him he testified that the check for \$250 which he gave plaintiff was given on August 8th, and post-dated the 13th, and had so testified on a former trial, but, after seeing the stub, admitted that he had been mistaken, and that the check was not made until the 13th. It is not necessary to discuss the question as to what weight should be given to the expert testimony in this case, or the general question as to its weight, or the numerous authorities cited by appellant upon that subject, since both parties resorted to it, and with about equal success.

3. No exceptions appear to have been taken to the instructions given, nor to the refusal of the court to give those requested by the defendant, and they cannot therefore be considered. We advise that the order appealed from be reversed and a new trial granted.

We concur: Searls, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order appealed from is reversed and a new trial granted.

CARLISLE v. TULARE COUNTY.

Sac. No. 218; May 29, 1897.

49 Pac. 3.

City Marshal—Fees for Serving Process.—Act of March 13, 1883, section 790 (Stats. 1883, p. 261), as amended by Statutes of 1893, page 299, provides, with reference to municipal corporations of the fifth class, that the city marshal shall execute and return all process issued and directed to him by any legal authority; that he shall, for service of any process, receive the same fees as constables, and shall receive from the city such compensation as shall be fixed by ordinance, in addition to the fees and mileage received for service of process in the state courts. Penal Code, section 817, makes marshals peace officers, and section 814 provides that warrants of arrest shall run "to any marshal," among other officers. Held, that fees earned by a marshal in serving process issuing out of a justice's court for the township in which the city is situated are chargeable to the county.

City Marshal—Fees for Serving Process.—Section 790 contains the condition that the marshal shall receive a compensation from the city in addition to the fees and mileage received "for service of process of the courts of this state, other than the recorder's court of such city." Under the municipal corporation act the recorder may be a justice of the peace as to some matters, and a recorder as to others. When acting as a justice in criminal matters coming before him under the Penal Code, his fees are chargeable to the county. Held, that, where the recorder is acting as justice of the peace, the marshal's fees for service of process issuing out of the recorder's court in misdemeanor cases under the statutes of the state are chargeable to the county.

APPEAL from Superior Court, Tulare County; Wheaton A. Gray, Judge.

Action by W. J. Carlisle against the county of Tulare. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

F. B. Howard, district attorney, and T. E. Clark for appellant; Power & Alford and W. B. Wallace for respondent.

SEARLS, C.—Action by W. J. Carlisle to recover from the county of Tulare \$518.35 as fees in criminal cases earned by plaintiff as city marshal of the city of Tulare. A demurrer was interposed to the complaint, which was overruled by the court, and defendant declining to answer, judgment went for plaintiff. Defendant appeals.

There are some six causes of action set out in the complaint. Waiving these separate statements, we may epitomize the complaint, and present the salient points, thus: The city of Tulare is, and at all the times herein mentioned was, a city of the fifth class, organized and existing under and pursuant to an "Act to provide for the organization, incorporation and government of municipal corporations," approved March 13, 1883, and is within the county of Tulare. The plaintiff was and is the duly elected, qualified and acting city marshal of said city of Tulare. As such city marshal, plaintiff rendered services in serving legal process, the fees for which amounted to \$518.35. Of this sum, \$276.40 was for service of process issuing out of justice's court for Tulare township, wherein the fees allowed constables for like services would amount to a like sum, and \$241.95 thereof was for service of process issuing out of the city recorder's court of the city

of Tulare in misdemeanor cases under the statutes of the state, wherein constables' fees for like services would amount to a like sum. None of the process so served in any of the cases was upon charges of violating any city ordinance. Plaintiff presented in due form his several claims to the board of supervisors of the county of Tulare for allowance, and that body rejected them upon the sole ground that they were not lawful charges against the county of Tulare. There was at all the times herein mentioned sufficient funds in the treasury of said county to pay said claims, as well as to pay all other claims and demands chargeable against it. The question turns upon the liability of the county for these charges of the city marshal for services, for which, had they been performed by a constable, it may be admitted the county would have been liable.

The act of March 13, 1883, entitled "An act to provide for the organization, incorporation and government of municipal corporations" (Stats. 1883, p. 93), provides for the incorporation of six classes of municipal corporations. As before stated, the city of Tulare is a municipal corporation of the "fifth class." Under this statute and its amendments, among the officers provided for this class of municipal governments is a city marshal: Stats. 1883, p. 250, sec. 751. The marshal has charge of the department of police, has within the city all the powers of a sheriff in the suppression of riots, public tumult, disturbance of the peace, or resistance against the laws or public authorities in the lawful exercise of their functions, etc. "He shall and is hereby authorized to execute and return all process issued and directed to him by any legal authority. It shall be his duty to prosecute before the recorder all breaches or violations of or noncompliance with any city ordinance which shall come to his knowledge": Stats. 1883, p. 261, sec. 790. The same section provides that "he shall, for service of any process, receive the same fees as constables"; and, after enumerating at some length his duties, the section closes as follows: "He shall perform such other services as this act and the ordinances of the board of trustees shall require, and shall receive such compensation as shall be fixed by ordinance." The legislature of 1893 (Stats. 1893, p. 299) amended section 790, *supra*, by adding after the word "ordinance," last above quoted, the words, "in addition to such mileage and fees as

he shall receive in the service of process of the courts of this state, other than the recorder's court of such city, which mileage and fees shall be the same as is allowed by law to constables in the county in which such city is situated." Section 790 had been amended in some particulars in 1889 (Stats. 1889, p. 396), but the amendment is immaterial to the present inquiry. Section 755 of the same act provides that certain officers, among whom is the marshal, "shall receive at stated times a compensation to be fixed by ordinance by the board of trustees, which compensation shall not be increased or dismissed after their election or during their several terms of office": Stats. 1883, p. 251. In *Pritchett v. Stanislaus Co.*, 73 Cal. 310, 14 Pac. 795, which was brought by the plaintiff to recover from the county of Stanislaus for services rendered by him as marshal of the city of Modesto, in the service of process under the laws of this state, this court held that the marshal of a municipal corporation of the sixth class was not entitled to compensation for such services unless the board of trustees of the municipality had fixed by ordinance the compensation to be paid him therefor. The statute relating to a marshal of the fifth class of municipal corporations in the act of 1883 did not differ in any material respect from that governing the sixth class, under consideration in the *Pritchett* case, *supra*. In that case it did not appear that any ordinance had been adopted by the city of Modesto fixing the compensation of the marshal. This act, as it then stood, restricted the compensation of the marshal to "such compensation as shall be fixed by ordinance": Stats. 1883, p. 261, sec. 790. But under the amendment of 1893, hereinbefore referred to, he receives from the city such compensation as shall be fixed by ordinance, "in addition to such mileage and fees as he shall receive in the service of process of the courts of this state, other than the recorder's court of such city, which mileage and fees shall be the same as is allowed by law to constables in the county in which such city is situated." It appears then: (1) That it is made the duty of the marshal to execute and return all processes issued and directed to him by any legal authority. (2) "He shall, for services of any process, receive the same fees as constables." (3) He shall receive from the city such compensation as shall be fixed by

ordinance, in addition to the fees and mileage received for service of process in the state courts. Clearly, the marshal is entitled to pay for this class of services. He is not entitled to such pay from the city, for two reasons: (1) The service of process from courts other than those of the city is a matter which does not concern the city. (2) For services rendered the city he can only be paid under an ordinance, and the amendment of 1893 contemplates that he shall be paid as constables are paid for like services. It is eminently proper that he should be paid by the county. The services rendered in criminal cases other than for violations of city ordinances are county charges. City marshals are peace officers: Pen. Code, sec. 817. Every warrant of arrest issued in this state runs, or should run, "To Any Sheriff, Constable, Marshal, or Policeman of Said State," etc.: Pen. Code, sec. 814. But it is claimed that \$241.95 of plaintiff's demand was for serving process issuing out of the city recorder's court of the city of Tulare in misdemeanor cases under the statutes of this state, etc., and hence that under the amendment of 1893 to section 790 (Stats. 1893, p. 299), as fees for services in the recorder's court are excepted, no recovery can be had therefor. Under the municipal act, city recorders in cities of the fifth class occupy a dual position. The recorder's court has jurisdiction concurrently with the justice's court of all actions and proceedings, civil and criminal, arising within the corporate limits of the city; and the recorder is vested with the powers and may perform the duties of a magistrate, and is entitled to such fees as are allowed by law to justices of the peace. He has exclusive jurisdiction of all actions for the recovery of any fine, penalty or forfeiture prescribed for a breach of any ordinance of the city, and of all actions founded upon any liability or obligation created by any ordinance, and of all prosecutions for any violation of any ordinance. For his services in the transaction of the city business he is paid such salary as shall be prescribed by ordinance. In *Curtis v. Sacramento Co.*, 13 Cal. 291, the plaintiff was city recorder, with the jurisdiction of a justice of the peace, virtually the same as here. He sued to recover fees earned in criminal cases under the laws of the state. The court held, in effect, that, as to

the jurisdiction conferred upon him in common with justices of the peace, he was to be treated as "really and in fact a justice of the peace." In *Prince v. City of Fresno*, 88 Cal. 407, 26 Pac. 606, it was held that under the municipal corporation act the recorder of a city may have a dual jurisdiction and functions, and may be a justice of the peace as to some matters, and a recorder as to others; that under the municipal act he possesses the right to act as a justice of the peace, and is to all intents and purposes a justice of the peace as to all criminal matters coming before him under the Penal Code, and when acting in cases under such code he has a right to charge the county and receive for his services such fees as are allowed by law to justices of the peace in the county for like services. By parity of reasoning it may be said that, when the legislature fixed the marshal's fees for services "other than [those earned in] the recorder's court of such city," it had in view the recorder's court as a local city court, with jurisdiction to hear and determine cases arising under city ordinances, and not to the recorder under his jurisdiction as a justice of the peace arising under the laws of the state, with all the powers of a justice of the peace and magistrate. There is no good reason why the several cities of the fifth and sixth classes should pay for the services of recorders and marshals, when, as justices of the peace and constables, they are engaged in disposing of the criminal business of the state, the cost of which devolves upon the several counties in which such cities are located: *Stats.* 1893, p. 511. In *Sonoma Co. v. City of Santa Rosa*, 102 Cal. 429, 36 Pac. 810, it was said, in substance, that it is the policy of our frame of government to localize as far as can be reasonably done, not only the power but the expense of government, so that the expense of the county government should be borne by the whole county, and the expense of the city government by the city, and that, where the language of the charter is doubtful, it ought to be construed with an eye to carrying out and maintaining this cardinal distinction. Our view in holding, as we do, that the fees in question earned by the marshal in vindication of the laws of the state in cases pending in the court of the recorder while that officer is acting as a justice of the peace are county charges, gives force and effect to the distinction enunciated in *Sono-*

ma Co. v. City of Santa Rosa, supra. We recommend that the judgment be affirmed.

We concur: Belcher, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

PURSER v. CADY.*

Sac. No. 183; June 17, 1897.

49 Pac. 180.

Execution Sale—Reversal of Judgment—Title of Purchaser.—Plaintiff claimed title to certain land under execution sale and sheriff's deed to his grantors. After such sale the judgment was reversed in the supreme court as far as it awarded counsel fees, but was in all other respects affirmed. Held, that, since no order for the restitution of the property sold was ever made, as provided by Code of Civil Procedure, section 957, plaintiff's title acquired by the execution sale was not affected by such reversal.

Execution Sale—Relation of Deeds.—Where judgments are rendered foreclosing liens for labor, the liens relate back to the time when the labor for which they were claimed commenced, and the deeds executed in pursuance thereto take effect by relation to the time the liens attached.

Execution Sale.—In Order to Recover Possession of Property purchased at execution sale, it is necessary to introduce in evidence the judgment as a basis of the execution.

APPEAL from Superior Court, Lassen County; W. T. Masten, Judge.

Action by Edward T. Purser against Frank P. Cady. Judgment for plaintiff and defendant appeals. Affirmed.

Goodwin & Goodwin for appellant; L. A. Shinn for respondent.

BELCHER, C.—The property involved in this case is situated in Lassen county, and described as that certain storage reservoir known as "Ball's Canyon Reservoir," or

*For subsequent opinion in bank, see 120 Cal. 214, 52 Pac. 489.

"Ward's Lake," located upon certain described sections of land, and a canal leading from said reservoir in an easterly direction to or near the town of Amedee, and known as the "Eagle Lake Company Canal." The action was commenced April 3, 1895, and it is alleged in the complaint that the plaintiff is the owner, in possession, and entitled to the possession of the said property, and of all water, water rights and appurtenances connected therewith; that defendant threatens and intends wrongfully and forcibly to take possession of said property, and to deprive plaintiff of the use thereof, and will do so unless restrained by an order of the court, to plaintiff's irreparable damage; and that defendant is insolvent, and unable to respond in damages, wherefore judgment is asked that defendant be perpetually enjoined from entering upon, taking possession of, or in any way interfering with the said property. Defendant answered, denying each allegation of the complaint, and by way of cross-complaint alleged that he was, and ever since the twenty-fourth day of August, 1894, had been, the owner of the said reservoir and canal, and asked the court to quiet his title thereto as against the claims of the plaintiff. Plaintiff answered the cross-complaint, denying all of its allegations, and again setting up title in himself. The issues raised by the cross-complaint were first tried, and as the result of the whole trial the court found all the facts in favor of the plaintiff, and on July 12, 1895, gave judgment as prayed for in the complaint. From that judgment the defendant appealed, and has brought the case here on a bill of exceptions.

At the commencement of the trial it was stipulated that both parties claimed title to the premises from a common source, the Eagle Lake Land and Irrigation Company, a corporation. To establish his title, the defendant relied on a judgment recovered by him against the said corporation in the superior court of Lassen county on June 13, 1893, upon a money demand; an execution issued on the judgment on January 25, 1894, and a sale thereunder on February 23, 1894, at which he was the purchaser, and a sheriff's deed executed to him on August 24, 1894. To establish his right to the property the plaintiff relied upon the following three sources of title: (1) Two judgments recovered in the superior court of Lassen county on February 5, 1894, by T. C.

Riggs and J. P. Keener against the said corporation, foreclosing alleged liens for labor performed by the plaintiff in the actions on the said reservoir and canal during the years 1892 and 1893; orders of sales issued on the said judgments, and sales thereunder on March 24, 1894, at which Riggs and Keener were the purchasers; two sheriff's deeds to the purchasers, executed October 2, 1894; and conveyances of the said property subsequently made by Riggs and Keener to the plaintiff here for the consideration of \$450 paid to each of the grantors. (2) A decree of foreclosure rendered December 4, 1894, in an action commenced March 26, 1894, in the superior court of Lassen county by the plaintiff herein against the said corporation, the defendant, Frank P. Cady, and others, to foreclose a mortgage upon the said reservoir and its appurtenances, executed on May 24, 1892, by the corporation to the plaintiff, to secure payment of its promissory note for \$6,800, of the same date; an order of sale on the said decree issued December 5, 1894, and a certificate of sale showing plaintiff to be the purchaser of the property, dated January 7, 1895. (3) A decree of foreclosure, rendered May 1, 1894, in an action commenced December 15, 1893, in the superior court of Lassen county by the plaintiff herein against the said corporation, the defendant, Frank P. Cady, and others, to foreclose a mortgage upon the Leavitt irrigation system, executed August 2, 1892, to secure payment of certain promissory notes; an order of sale and a deed of the property executed to the plaintiff herein before the commencement of this action by the commissioner duly appointed to make the sale.

The finding of the court that plaintiff was in possession of the property in controversy is not questioned, and there was evidence tending to show that his possession commenced, with the permission of the owner, early in 1893. Appellant, however, contends that none of the other findings in favor of the plaintiff were justified by the evidence. The first questions, then, to be considered relate to the Riggs and Keener judgments and the deeds executed in pursuance of sales thereunder, through which plaintiff claims title. It appears from the record that on February 1, 1895—a year less four days after the judgments were entered—the defendant corporation caused to be served and filed notices of appeal therefrom to the supreme court; and our attention is called

by counsel to the fact that in December following the judgments were reversed in so far as they awarded counsel fees, and declared that the plaintiff was entitled to a lien upon the property of the defendant, and directed a sale of such property, but in all other respects affirmed: *Keener v. Irrigation Co.*, 110 Cal. 627, 43 Pac. 14; *Riggs v. Irrigation Co.* (Cal.), 43 Pac. 15. Did these reversals have the effect to destroy the title which had apparently vested in the plaintiff more than a year before the decisions were rendered? The judgments were regular in form, directing the sale of the property to satisfy liens which were adjudged to exist, and were rendered by a court having jurisdiction of the parties and the subject matter, and at the time of the commencement of the actions notices of lis pendens in due form were recorded in the office of the county recorder.

The Code of Civil Procedure contains the following provisions:

"Sec. 945. If the judgment or order appealed from direct the sale or delivery of possession of real property, the execution of the same cannot be stayed unless a written undertaking be executed on the part of the appellant," etc.

"Sec. 957. When the judgment is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment or order, so far as such restitution is consistent with the protection of a purchaser of property at a sale ordered by the judgment, or had under process issued upon the judgment, on the appeal from which the proceedings were not stayed; and for relief in such cases the appellant may have his action against the respondent enforcing the judgment for the proceeds of the sale of the property, after deducting therefrom the expenses of the sale."

In the cases referred to it does not appear that any order for the restitution of the property sold was ever made by the appellate court or the superior court. The purchaser's title to the property was, therefore, not affected by the reversals, and appellant's remedy, if any he had, was an action for damages: *Reynolds v. Hosmer*, 45 Cal. 616; *Withers v. Jacks*, 79 Cal. 297, 12 Am. St. Rep. 143, 21 Pac. 824; *Spring Valley Waterworks v. Drinkhouse*, 95 Cal. 220, 30 Pac. 218. The liens foreclosed related back to the time when the labor for which they were claimed commenced (*Ger-*

mania Building etc. Assn. v. Wagner, 61 Cal. 349; Pacific Mut. Life Ins. Co. v. Fisher, 106 Cal. 224, 39 Pac. 758), and the deeds executed in pursuance of the judgments of foreclosure took effect by relation at the time the liens attached (Freeman on Executions, sec. 333; Sharp v. Baird, 43 Cal. 577; Porter v. Pico, 55 Cal. 165; Brady v. Burke, 90 Cal. 1, 27 Pac. 52). Appellant had at least constructive notice of the liens claimed at the time of his purchase, and he was, therefore, not a bona fide purchaser without notice. "To entitle a party to protection as such a purchaser, he must aver and prove the possession of his grantor, the purchase of the premises, the payment of the purchase money in good faith, and without notice, actual or constructive, prior to and down to the time of its payment, for, if he had notice, actual or constructive, at any moment of time before the payment of the money, he is not a bona fide purchaser": Eversdon v. Mayhew, 65 Cal. 163, 3 Pac. 641; Wilhoit v. Lyons, 98 Cal. 409, 33 Pac. 325.

There was no error in admitting in evidence the Riggs and Keener judgments. "For the purpose of recovering possession of the property purchased at a sale under such execution, it is necessary to introduce in evidence the judgment as the basis of the execution, and, if the enforcement of the judgment has not been stayed, the fact that an appeal therefrom has been taken does not prevent the judgment from being received in evidence and considered": Colton Land and Water Co. v. Swartz, 99 Cal. 284, 33 Pac. 878. There was evidence that defendant said he had been advised to take possession, if need be, with a shotgun, and that he was going to take possession. Under the circumstances shown, plaintiff was clearly entitled to institute and maintain an action to enjoin defendant from entering upon and taking possession of the property. In view of what has been said, it is unnecessary to consider the plaintiff's second and third sources of title. We find in the record no valid ground for reversal, and advise that the judgment be affirmed.

We concur: Haynes, C.; Chipman, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

SPAULDING v. MAMMOTH SPRING MIN. CO. et al.

Sac. No. 186; June 17, 1897.

49 Pac. 183.

Lien for Wages—Employees of Corporations.—Plaintiff Alleged that between June 1 and December 27, 1893, he performed one hundred and seventy days' labor on the mine of defendant corporation, that said services were worth \$200 per month, and that a balance of \$1,200 was due him. A second count alleged that about March 1, 1893, he was employed by defendant at \$200 per month; that from said date until December 27, 1893, he labored on defendant's mine nine and one-half months; and that he had received \$700, leaving a balance of \$1,200. A third count was on a claim assigned to him for services performed by one D., and alleged that such services were reasonably worth \$3 per day. The court found that plaintiff's services were reasonably worth \$150 per month, and that D.'s services were reasonably worth \$3 per day. Held, that plaintiff was not entitled to a lien under Statutes of 1891, page 195, providing for the payment of wages of laborers employed by certain corporations, and creating a lien therefor that can be enforced only when plaintiff shows that the wages were payable weekly or monthly.

APPEAL from Superior Court, Sierra County; Stanley A. Smith, Judge.

Action by E. Spaulding against the Mammoth Spring Mining Company and J. D. Reilly to recover of defendant company money due plaintiff for services, and to establish a lien therefor. Pending the action, plaintiff died, and H. Spaulding, administrator of his estate, was substituted as plaintiff. There was a judgment against defendant company by default. From that portion of the judgment declaring plaintiff entitled to a lien and that such lien is superior to an attachment lien of defendant Reilly the latter appeals. Reversed.

Frank R. Wehe for appellant; F. D. Soward for respondent.

HAYNES, C.—On December 18, 1893, J. D. Reilly, the appellant in this case, commenced an action against the Mammoth Spring Mining Company to recover the sum of \$428.53 due him from said corporation for timber theretofore sold

and delivered to said corporation, and on the same day caused a writ of attachment to be issued in said action, which was levied upon all the property of the corporation. At and prior to the date of said attachment said corporation was indebted to E. Spaulding and Daniel Dever for labor performed upon the mining property of said corporation. Denver assigned his claim for said labor to Spaulding, and on January 2, 1894, E. Spaulding commenced an action against the corporation to recover the same, and made appellant, Reilly, a party defendant. Pending the suit, E. Spaulding died, and his administrator was substituted as plaintiff. The action of Spaulding against the corporation was brought under an act entitled "An act to provide for the payment of the wages of mechanics and laborers employed by corporations," approved March 31, 1891 (Stats. 1891, p. 195), and which purports to create a lien in favor of laborers under the circumstances therein stated. Reilly was made a defendant for the purpose of determining the priority of liens. The corporation made default. Defendant Reilly moved to strike out a portion of the complaint, which motion was denied, and he excepted. A demurrer interposed by him to the complaint was also overruled, and he thereupon answered. This cause and the case of Reilly against the corporation were tried at the same time by the court without a jury, and judgments were entered in each case against the corporation. The findings in this case show all the facts necessary to establish Reilly's attachment lien, and also find that the plaintiff is entitled to a lien under said statute, and that the lien of the plaintiff is superior to that of appellant, Reilly, and should be first satisfied out of the property of the corporation. Appellant contends, "as it is not alleged or found that the wages earned were due weekly or monthly, that that portion of the judgment awarding counsel fees, and decreeing that plaintiff is entitled to a lien as against appellant, should be reversed." As to the labor of the plaintiff, it was alleged that between the first day of June and the twenty-seventh day of December, 1893, he performed one hundred and seventy days' labor upon the mine of the defendant corporation, and that his said services were reasonably worth \$200 per month, and claiming a balance of \$1,200. A second count alleged that on or about the first day of March, 1893, he was employed by the defendant cor-

poration at the wages of \$200 per month, and that from said first day of March, 1893, until the twenty-seventh day of December, 1893, he labored upon defendant's mine nine and one-half months, making the aggregate amount earned \$1,900, admitted a payment of \$700, leaving a balance of \$1,200. The third cause of action was upon the claim assigned to the plaintiff for services performed by Dever, and as to those services it was alleged that they were reasonably worth \$3 per day. The court found that the services of the plaintiff were reasonably worth \$150 per month, and that the services of Dever were reasonably worth \$3 per day. Under these allegations and findings, the plaintiff is not entitled to a lien under said statute. In *Keener v. Irrigation Co.*, 110 Cal. 627, 43 Pac. 14, this statute will be found set out in the opinion, at page 630, 110 Cal.; and page 14, 43 Pac., and it was there said: "By the terms of the first section of this act, it does not apply to all corporations, but only to those who, while doing business in this state, employ laborers and mechanics by the week or month, whose wages, under the terms of their employment, are payable weekly or monthly. It does not purport to impose upon those corporations any duty or liability toward all the mechanics or laborers whom they may employ, or to create a right in favor of those of its employees whose wages are not earned or payable by the week or by the month. As the remedy sought to be enforced herein exists only by virtue of the statute, it was incumbent upon the plaintiff to bring himself within the terms of the statute, and to show that the wages earned by him were due weekly or monthly." That case was decided in department 1 and a hearing in bank was denied. In *Ackley v. Mining Co.*, 112 Cal. 42, 44 Pac. 330, the same question was again presented, and again decided in the same way in department 2. Hence the question has been considered by both departments. And in the later case *Keener v. Irrigation Co.* was followed and approved, and we see nothing in the argument of respondent which would seem to require a reconsideration of the former decisions. The findings in this case clearly show that there was no agreement under which either Spaulding or Dever could be said to have been working by the week or the month, or that their wages, however earned, were payable either weekly or monthly.

In view of the above authorities, it is not necessary to consider the point made by appellant that the act of 1891, under which respondent claims a lien, is unconstitutional, nor is it necessary to notice either of the rulings above referred to. We advise that the judgment in favor of the plaintiff for the amount found due for labor, to wit, \$1,715.43, and costs, \$33.90, be affirmed, and that that portion of the judgment awarding counsel fees to the plaintiff, and declaring that plaintiff is entitled to a lien upon the property described in the complaint and judgment, and directing the sale of said property, be reversed, and that appellant recover his costs on this appeal.

We concur: Searls, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment in favor of the plaintiff for the amount found due for labor, to wit, \$1,715.43, and costs, \$33.90, is affirmed; and that portion of the judgment awarding counsel fees to the plaintiff, and declaring that plaintiff is entitled to a lien upon the property described in the complaint and judgment, and directing the sale of said property, is reversed; and it is ordered that appellant recover his costs on this appeal.

FRESNO LOAN & SAVINGS BANK v. HUSTED et al.

Sac. No. 257; June 17, 1897.

49 Pac. 195.

Mechanic's Lien—House on Another's Lot.—A Went into Possession of certain lots, then owned by B, under a contract of purchase, built and paid for a house thereon, and afterward removed the house on to the land of C, as a temporary resting place, without B's permission, and after default in the payments on the lots. Held, that it cannot be implied that B furnished the material with which the house was built, nor that A acted at the time of constructing the house as the agent of C, so as to subject C's lot to a lien under sections 1183, 1185, 1192, Code of Civil Procedure.¹

Mechanic's Lien—House on Another's Land—Notice.—C was not required to post written notice upon this building within three

¹ Cited in note in Ann. Cas. 1912B, 19, 20, on nature of improvement for which mechanic's lien may exist.

days after it was moved on his lots, under section 1192, *supra*, in order to escape liability, as the house, by agreement, was to remain on the lots in question but a few days, and was therefore personal property while it rested there.

APPEAL from Superior Court, Fresno County; E. W. Risley, Judge.

Action brought by the Fresno Loan and Savings Bank to enforce a materialman's lien against Mary Husted and W. R. Flannagan. Plaintiff appeals from the judgment of the court below and its order denying a motion for a new trial. Affirmed.

Horace Hawes for appellant; Frank H. Short, F. E. Cook and Strother & Strother for respondents.

CHIPMAN, C.—Plaintiff, being the owner of certain lots in the city of Fresno, entered into a contract of sale thereof with defendant Mary Husted, on March 6, 1891, for the consideration of \$2,000; payments to be \$40 upon signing the contracts, and \$40 monthly until fully paid. It nowhere appears in the transcript whether these or any payments were made, nor whether said Husted was in default in the payments. She entered into possession under the contract, however, and purchased materials of the admitted value of \$277.14, and with them erected a dwelling on these lots, which she occupied. For some reason not explained, defendant Husted, about November, 1894, caused the building to be removed to the lots of defendant Flannagan. The removal took place on Sunday. Within thirty days thereafter plaintiff caused to be filed and recorded a materialman's lien upon the Flannagan lots, alleging that it furnished lumber and other building material to be used in the construction of the building in question; that the lots sought to be charged with the lien are lots belonging to defendant Flannagan; that defendant Husted, about November, 1894, entered into a contract with plaintiff, under which said materials were furnished; that she agreed to pay therefor their reasonable market value; that said materials were used in constructing said building upon the lots of said Flannagan with his knowledge and consent; that said contract has been fully performed, and said building or structure finished, etc. This action was brought to enforce the lien upon defendant Flannagan.

nagan's lots. Defendants answered, denying the allegations of the complaint. The cause was tried by the court, without a jury, and judgment given for defendants. The appeal is from the judgment and from the order denying a new trial.

The court found against all the allegations of plaintiff's complaint except it found that defendant Flannagan owned the lots to which the building was removed, but it found also that "it was not built or located thereon permanently, but was merely, by an arrangement between the defendants Flannagan and Husted, temporarily placed and allowed temporarily to remain upon the said lots, with the understanding that it might be removed at any time by the defendant Mary Husted." This finding as to the understanding between the defendants is warranted by the evidence. The court finds, as alleged in the lien and complaint, that the building was placed on the Flannagan lots about November 25, 1894, and that plaintiff filed its claim of lien in due form within thirty days thereafter; but the court finds "that the statements and affirmations of said lien were false in fact; that the plaintiff then had no claim or demand justly due or enforceable against said defendants, or either of them, with or without offsets, and the said materials were not furnished by the persons stated in said claim of lien or at all." The evidence sustains this finding. It seems to me the case lies in a nutshell, and that there is no demand upon us to follow plaintiff's counsel in his excursion through the reported cases of this character, and into the wide domain of general law to which his learned brief invites us.

The undisputed facts upon which the case rests are: That defendant Husted went into possession of certain lots, then owned by plaintiff, under a contract of purchase; that she built and paid for the house in controversy on these lots (whether the house was attached to the soil, and became a part of the freehold, is very doubtful from the evidence; indeed, the evidence would warrant a finding that it was not so attached, but the fact, in my view, is unimportant); that she removed the house, and no permission was given her by plaintiff to do so, and no right was given her by the terms of her contract to remove the house; that, in placing the house upon Flannagan's lots, it was only as a temporary resting place; that Flannagan knew nothing about defendant Husted previously, nor of her contract with plaintiff,

nor where the house came from that found its way to his lots. Flannagan testified: "Somewhere about November, about the first, Mr. Hague came to me; wanted to know if I would allow a poor woman to move her house on my lots for a short time. I told him, 'Yes.' I believe he said she would only want it to stay there a short time, or that she might buy my lots; and under these circumstances I let him move it there—told him he could. I did not know who the lady was. That is all I know about it. It was moved on the lots on Sunday. Mr. McKinzie [business agent of plaintiff] came to the store on Monday morning, and asked me about it. That was the first I knew he or the bank had any connection with it. I did not know Mrs. Husted at all until after the house was on the lots; never had any talk with her at all." It was not disputed that defendant Husted bought and paid for the materials in the house, and caused it to be moved. The evidence also showed that the house, after removal to Flannagan's lots, "rested on mudsills on top of the ground."

The facts necessary to be alleged in the claim of lien, and that were alleged—to wit, that plaintiff "has furnished lumber and other building material to be used in the construction of that building or structure," etc.; and that "Mrs. Mary F. Husted is the name of the person who," etc., "as agent of such owner at Fresno, in the state of California, entered into a contract with this claimant under and by which said materials were furnished, and the following is a statement of the terms, time given, and conditions of said contract," etc.; and "that said contract has been fully performed on the part of claimant"—are all found to be untrue, and it is only by some presumption of law that the allegations of the claim can be said to be true in any sense. They were not true in fact, and the court properly so found. Their truth, and the truth that a contract for furnishing the materials was made by defendant Husted with plaintiff, all rests, by implication, upon the original contract of sale of the plaintiff's lots to defendant Husted. To put it in plain phrase: It is claimed that, because defendant Husted made a contract to purchase plaintiff's lots, therefore, when she built a house thereon at her own expense, it was to be implied that the plaintiff furnished the material; that she was then acting as the agent of Flannagan, who owned the lots to which the house was long afterward removed, but who

did not know her, and had never seen her, and never heard of any contract between her and plaintiff as to the purchase of plaintiff's lots; that, as such agent of Flannagan, she entered into a contract with plaintiff under which the materials were furnished; and that plaintiff performed its part of the contract by furnishing the materials, and paying for them. All this is to be implied as true, against the actual facts to the contrary, in order to sustain the lien and the action.

By section 1183 of the Code of Civil Procedure, materialmen are given a lien for materials used in the construction of any building "upon the property upon which they have bestowed labor, or furnished materials, for the value of such labor done and materials furnished, whether at the instance of the owner or of any other person acting by his authority." The lien here given is upon the property upon which labor is bestowed (in this case the house in question). By section 1185 of the same code it is provided that "the land upon which any building . . . is constructed, together with a convenient space about the same, . . . is also subject to the lien, if, at the commencement of the work, or of the furnishing of the materials for the same, the land belonged to the person who caused said building . . . to be constructed." By section 1192 of the same code it is provided that "every building . . . mentioned in section 1183 of this code, . . . constructed upon any lands with the knowledge and consent of the owner, . . . shall be held to have been constructed at the instance of such owner, . . . and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this chapter, unless such owner . . . shall within three days after he shall have obtained knowledge of the construction . . . give notice that he will not be responsible by posting notice in writing," etc.

The building had been completed for some time before removal (how long does not appear), and was occupied at the time of removal, and the furniture remained in it during removal. When it was constructed, there was no intention to remove it to the Flannagan lots. I cannot conceive how plaintiff can have a lien on Flannagan's lots for materials it never furnished nor paid for, nor authorized to be furnished, nor agreed to be responsible for, which materials were used in the construction and completion of a house

erected on its own land by a stranger to Flannagan, and without any authority whatever from him, and without his knowledge. The evidence justifies the finding of the court that the building was removed to his lot, not to remain, but to rest there temporarily, as an accommodation to a woman he had not then seen or known. The evidence shows that, when the bank manager tracked the house to the Flannagan lots on Monday morning (the house was moved on the previous Sunday), Flannagan told the manager that he knew nothing about where the house came from, but supposed it belonged to the poor woman whose house he had been requested to allow to be put on his lots; that he did not know who she was, nor that the bank had anything to do with it, or had any interest in it. Waiving the question whether a lien could attach at all upon lots to which a completed building has been removed bodily, and waiving other questions raised in the briefs—for example, whether the house was constructed on his lots—I do not think Flannagan was called upon, under the circumstances, to post written notice upon this building within three days after it was removed to his lots in order to relieve himself from responsibility. It became no part of the realty. By agreement, it was to remain but a few days. He could not have successfully resisted defendant Husted's right to remove it. It was personal property when it got to his place, and while resting there, whatever it might be regarded while on plaintiff's lots. The alleged lien cannot be sustained upon Flannagan's lots. Whether there is a lien upon the building need not be considered, for none is claimed. It seems to me plaintiff has wholly mistaken its remedy.

Appellant claims that, under any circumstances, defendant Flannagan is liable for money had and received. In an appropriate action sustained by competent proof, if it exists, possibly he may be so liable. Flannagan makes no claim to the house. It is not alleged or shown that he has wrongfully converted it. So far as we know, it may have been since removed from his lots by defendant Husted. No demand has been made upon him for a return of the house to its former situs, nor for its possession, nor for its value. He has not been shown to have had any such knowledge, as to the removal of the house to his lots, as would make him a cotrespasser in the removal. The pleadings in the case

present no issue upon which defendant Flannagan can be made to surrender the property, or, failing to do so, to pay its value. The judgment of the court and its order overruling plaintiff's motion for a new trial should be affirmed, and it is so recommended.

We concur: Belcher, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment of the court and its order overruling plaintiff's motion for a new trial are affirmed.

MECHANICS' INSTITUTE v. FIRTH et al.*

S. F. No. 588; June 23, 1897.

49 Pac. 214.

Treasurer's Bond.—In an Emergency to Meet a Pay-roll of \$1,878, a corporation's treasurer obtained \$600 of its funds from one of its officers, and paid it to the secretary, the disbursing agent, receiving his receipt therefor, and its president paid \$600 of his own money direct to the same agent. Subsequently the board of directors, upon the account of the pay-roll, ordered warrants drawn for a check of \$600 to repay the president, and one of \$1,273 for cash, which warrants were presented by the secretary, and were honored by the treasurer, as he was in duty bound to do. In the books the treasurer charged himself with the \$600 received from the officer, and credited himself with the amount disbursed on the pay-roll. He did not charge himself with the money received from the president, which did not come into his hands, but credited himself with the check of \$600, to repay the president, and the check of \$1,273. Held, not to show any shortage on the part of the treasurer.

APPEAL from Superior Court, City and County of San Francisco; John Hunt, Judge.

Suit by Mechanics' Institute, a corporation, against J. K. Firth and others. From a judgment for defendants, plaintiff appeals. Affirmed.

T. M. Osmont and Eli T. Sheppard for appellant; E. F. Preston and W. F. Gibson for respondents.

*Rehearing denied.

HENSHAW, J.—These appeals are from the judgment, and from the order denying plaintiff a new trial. Defendant Firth was the treasurer of the corporation plaintiff. The defendants Fretwell and Kerr are his bondsmen. Plaintiff sued to recover the sum of \$600, alleged to have been misappropriated. The facts disclosed upon the trial were as follows: The moneys of the plaintiff corporation were deposited in a bank, and were paid out by treasurer's checks upon presentation to him by the secretary of warrants ordered drawn by the board of directors. J. H. Culver was the secretary of the plaintiff, and its business or executive manager. In January, 1893, the plaintiff corporation was engaged in preparing for the twenty-seventh industrial exposition of the institute. Repairs were in progress at the Mechanics' Pavilion. Upon Saturday, January 7, 1893, it became necessary to pay the workmen. The pay-roll amounted to \$1,878.20, the payment of about \$1,200 of which was urgent. No warrants had been ordered drawn by the directors to meet this payment, and it was after banking hours when the secretary, Culver, communicated with the treasurer, asking him to procure what money he could, and bring it to the pavilion. The Mechanics' Institute Library was owned and conducted by plaintiff corporation, and its moneys were a part of plaintiff's funds. The treasurer went to the librarian, and obtained from him the sum of \$600, giving him his receipt therefor. This money he carried to the Mechanics' Pavilion, delivered it to the proper agent of the corporation, and took Culver's receipt therefor. There is no question but that this sum was properly disbursed upon account of the pay-roll. The president of the institute was Irwin C. Stump. In the emergency he also had been called upon to furnish money, and he, too, delivered to the agent of the corporation a like sum of \$600, which was properly disbursed. This money, however, did not pass into nor through the hands of the treasurer. When the board of directors subsequently met, they ordered two warrants drawn upon their treasurer upon account of the pay-roll—the one for \$600, to repay Stump, the other for \$1,278.20. These demands were presented by Culver to the treasurer, and he, in obedience to them, as was his duty, drew his treasurer's check for \$600 for Stump, and a check for \$1,278.20 payable to cash. These two checks he delivered to Culver, taking his receipts therefor. Stump in due time re-

ceived his money, and no question arises upon this point. The treasurer charged himself upon his books with the \$600 obtained by him from the librarian, by crediting it as a cash payment into the library fund, and credited himself with its disbursement upon account of the pay-roll, for which disbursement he held as a voucher the receipt of the secretary, Culver. He also charged the institute with the disbursement of the \$600 evidenced by the Stump check, and of the \$1,278.20 evidenced by his check, payable to cash, and taken by Culver, whose receipts for both of these amounts, as well as the warrants ordering him to pay them, form his vouchers therefor. He did not, however, charge himself with the receipt of the Stump \$600.

The very obvious result of these transactions is that, having a pay-roll of \$1,878.20 to meet, the institute paid \$600 of the sum out of its own funds, to wit, out of the moneys received from the librarian, thus leaving to be met by it the sum of \$1,278.20. When, however, it came to order its warrants drawn, it ordered for the full amount of \$1,878.20. Thus, in fact, it disbursed upon account of the pay-roll the sum of \$2,478.20. Leaving aside for the moment the question of bookkeeping, and tracing the money through the vouchers, it is equally apparent that the treasurer shows that he has properly expended and accounted for the \$600 obtained from the librarian, and he also shows by vouchers whose genuineness is uncontested that the \$600 Stump check and the check to cash for \$1,278.20 passed from his hands under order of the board of directors, and into the hands of the secretary, Culver. In short, the treasurer's books show that every dollar by him received was paid out upon the order of the board of directors, saving in one instance of the \$600 obtained from the librarian, the account of which was properly entered in his books, and the disposition of which is beyond question. But it is said that in failing to charge himself with the receipt of the Stump \$600, and in charging its disbursement to the institute, he forced a balance in his favor to that amount. But, in fact, he never did receive the money. It never passed into the treasury of the corporation, and he was not chargeable with it. To illustrate: If the institute at the time of this transaction had possessed funds in the sum of \$3,000, and if Stump upon that day had paid all of the pay-roll, and if it was the treas-

urer's duty to charge himself with the Stump payment, as though it had been moneys received by him, the result would be that to the credit of the institute would be shown funds to the amount of \$4,878.20, against which would be the single disbursement by payment to Stump of \$1,878.20, leaving actual cash on hand the sum of \$1,121.80, with the books showing \$3,000 on hand, and the treasurer liable for the difference. The truth of the matter seems to be that the directors, instead of ordering the \$1,278.20 warrant drawn, should have ordered a warrant drawn for \$678.20; but, having ordered it for the greater amount, it was the unquestioned duty of the treasurer to honor it as he did, and there is no doubt but that the check passed into the hands of the secretary, Culver, and by him was cashed. For this deficiency, then, it would seem clear that he, and not the treasurer, is accountable. Indeed, this was the view first taken by all parties, for, upon an examination of the books at the close of the term, it was determined that Culver was responsible for \$600, and a demand was made upon him for that amount, and he paid it to the plaintiff. Twenty-two months after, with a new board of directors and another examination of the books, the examiner reached the conclusion that the treasurer was responsible for the shortage, and, by vote of the board of directors, the \$600 was restored to Culver, a demand for that sum made upon the ex-treasurer, and, upon his refusal to accede to it, this action was commenced. It may also be added that plaintiff's experts do not pretend to trace the \$600 as money, but merely find that it was the duty of the treasurer to pay out moneys only upon warrants, and that there appears upon his books one item of \$600 paid out not upon a warrant. This, however, is the item of \$600 moneys obtained from the librarian, the history of which the treasurer's books, his voucher from Culver, and the parol testimony of its disbursement to the workmen, fully show, and, in so showing, entirely exonerate the treasurer from any charge of misappropriation.

The findings and judgment of the court were in consonance with this review of the evidence, and the judgment and order appealed from are therefore affirmed.

We concur: Temple, J.; McFarland, J.

ROGERS et ux. v. KIMBALL et al.*

L. A. No. 199; July 9, 1897.

49 Pac. 719.

Note.—Release of T. and L., Two of the Signers of a note, by the other signers, in consideration of the agreement of L. to make a conveyance to such other signers, is not invalidated, as to T., at least, by failure of L. to make the conveyance.

Note.—A Release in Writing of Certain Signers of a note by the other signers need have no consideration; Civil Code, section 1541, providing, "An obligation is extinguished by a release therefrom given by the creditor . . . in writing with or without new consideration."

Note.—Agreement for Indemnity—Consideration.—An agreement by certain signers of a note to assume responsibility for its payment, and to indemnify the other signers for any loss or damages they may sustain on account of it, stands on the same footing, as concerns consideration, as a release.

Note.—Indemnity—Contribution.—A Signer of a Note, Who has Been Released from liability thereon by the other signers, who also agree to indemnify him for any loss or damage he may in any manner sustain on account of the note, can, on paying judgment rendered against him on the note, recover therefor of the others, though they had paid the note before judgment was rendered against him, and though they had no notice of the action against him, there being no defense which he was informed of and neglected to interpose.

Note.—Indemnity.—The Release of One of the Signers of a note by the others from liability thereon, and their agreement to indemnify him for any damages on account of the note, being joint, he can recover against them all, though judgment is rendered against him on the note for only the balance thereof remaining after one of them had paid his proportion thereof.

APPEAL from Superior Court, San Diego County; George Puterbaugh, Judge.

Action by Thomas L. Rogers and wife against Warren C. Kimball and others. Judgment for defendants. Plaintiffs appeal. Reversed.

David L. Withington (Works & Works and Withington & Carter of counsel) for appellants; W. J. Hunsaker, N. H.

*For subsequent opinion in bank, see 121 Cal. 247, 53 Pac. 643.

Conklin, M. A. Luce and McDonald & McDonald for respondents.

HAYNES, C.—The complaint alleges that on February 25, 1882, the plaintiffs and the defendants Warren C. Kimball and Moses A. Luce, and James S. Gordon, since deceased, executed their promissory note for \$10,000, payable to the order of the Consolidated Bank of San Diego six months after date, with interest, and that said bank afterward indorsed said note to Bryant Howard; that plaintiff Ella S. Rogers signed said note at the request and for the accommodation of said Kimball, Luce and Gordon; that on February 27, 1882, plaintiff Thomas L. Rogers conveyed and caused to be conveyed to said Kimball, Luce and Gordon a one-fifth interest in and to a certain concession made by the Mexican government of the right to construct a railroad to be known as the "Sonora and Baja California Railroad," and that in consideration of said conveyance said Kimball, Luce and Gordon executed and delivered an agreement in writing, of which the following is a copy: "We, the undersigned, for and in consideration of a conveyance to us, of even date herewith, of a one-fifth interest in and to the concession by the government of Mexico of the right to construct a railroad to be known as the 'Sonora and Baja California Railroad,' do hereby assume all responsibility for the payment in full of a note of date February 25, A. D. 1882, made to the Consolidated Bank of San Diego, and signed by the undersigned, together with Thomas L. Rogers and Ella S. Rogers; hereby releasing from any payment thereon, as joint or several payers, the said Thomas L. Rogers and Ella R. Rogers, and hereby agreeing with the said Thomas L. Rogers and Ella S. Rogers to indemnify them in full for any loss or damage they may in any manner sustain on account of said note. Witness our hands this 27th day of February, A. D. 1882. Warren C. Kimball. James S. Gordon. Moses A. Luce."—and thereby agreed to and did release the plaintiffs from said note; that the said defendants and the said Gordon have paid no part of said note except the sum of \$3,333.33 paid by said Kimball; that said Howard, to whom said note had been transferred by the bank, on the fifteenth day of May, 1886, brought suit thereon against the plaintiffs herein, Thomas L. Rogers and Ella S. Rogers, in the circuit court

of the United States for the district of Massachusetts, and obtained judgment against them on the fourteenth day of March, 1889, for the sum of \$7,019.97 damages and \$63.12 costs; that on February 20, 1893, an execution thereon was issued, and on February 24, 1893, the plaintiff Ella S. Rogers paid out of her separate property, in full satisfaction of said judgment and execution, the sum of \$7,100; that the plaintiffs are husband and wife; that Ella S. Rogers has demanded payment from the defendants of said sum; that no part of it has been paid; and judgment therefor in her favor is demanded. The death of James S. Gordon on July 29, 1892, the appointment and qualification of defendant Jessie Gordon Whittlesey as administratrix, and the presentation of said claim, are also duly alleged, and are not denied. The defendants, Moses A. Luce and Jessie Gordon Whittlesey, filed a joint answer, in which they (1) deny that Mrs. Rogers signed said note for their accommodation, or at their request, and allege that defendants signed said note at the request and for the benefit of the plaintiffs; (2) deny that Thomas L. Rogers conveyed or caused to be conveyed said concession, or that in consideration of such conveyance they executed the agreement of release or indemnity set out in the complaint; (3) deny, for want of information, the allegations touching the judgment and execution in the United States circuit court, and its satisfaction. For a second defense they allege that, at the time they executed said indemnity agreement, Thomas L. Rogers agreed to convey to Kimball, Luce and Gordon a one-fifth interest in said concession, and that said agreement to convey said interest was the consideration for the execution of the indemnity agreement by Kimball, Luce and Gordon, and that Rogers never did convey, or cause to be conveyed, said or any interest in that or any other concession, and, upon information and belief, allege that Rogers never had or owned or could convey any interest in said concession, whereby the consideration for their execution of the indemnity wholly failed, and aver that they received no consideration whatever for the execution of said agreement; and for a third defense they pleaded that plaintiff's cause of action is barred by section 337 of the Code of Civil Procedure. Defendant Kimball answered separately. His first defense consisted of substantially the same denials as those contained

in the answer of his codefendants, except that he also denied that by said agreement he agreed to release the plaintiffs from their obligations to pay said note, or to indemnify them against it, and also denied, upon information, that no part of said note had been paid except \$3,333.33, and denied that said note was, not long before the commencement of this action, wholly satisfied and discharged. For a second defense he alleged that, at the time the indemnity agreement was executed, Rogers agreed to convey said interest in said concession, and his failure to make said conveyance, whereby the consideration for said agreement wholly failed; and for a third defense he alleged, upon information, that during the year 1886, and soon after the payment made by him mentioned in the complaint, Gordon and Luce paid to the holder of said note the balance remaining unpaid; that the action begun by Howard on said note against the plaintiffs herein (if the same was begun by said Howard at all) was begun without his knowledge or consent, and without authority from him, and was prosecuted by said Howard after the said note had been fully paid and discharged, and that the said plaintiffs, and each of them, had a full and perfect defense thereto, and that the payment of said judgment by Ella S. Rogers, if any such payment was ever made, was voluntary. Defendant Kimball also pleaded the same statute of limitations. This action was commenced October 10, 1893. The cause was tried by the court without a jury, and written findings were filed, upon which judgment was entered for the defendants, and this appeal is by the plaintiffs from the judgment, and from an order denying a new trial.

The first finding is that plaintiffs and defendants made the promissory note, a copy of which is attached to the complaint as Exhibit A. The remaining findings are as follows: "(2) That the plaintiff Ella S. Rogers did not sign said note for the accommodation and at the request, or for the accommodation or at the request, of said Warren C. Kimball, Moses A. Luce, and James S. Gordon, or for the accommodation or at the request of either of them, but that said plaintiff Ella S. Rogers and said Warren C. Kimball, Moses A. Luce, and James S. Gordon each and all signed said note for the accommodation and at the request of plaintiff Thomas L. Rogers, and that said Thomas L. Rogers received from the Consolidated Bank of San Diego, the

payee named in said note, the whole consideration therefor, to wit, the sum of \$10,000, and that neither the plaintiff Ella S. Rogers nor said Warren C. Kimball or Moses A. Luce or James S. Gordon received any part of the consideration for which said note was executed. (3) That on the twenty-seventh day of February, 1882, the plaintiff Thomas L. Rogers promised and agreed to convey and caused to be conveyed to said Warren C. Kimball, Moses A. Luce, and James S. Gordon a one-fifth interest in and to a certain concession made by the government of Mexico of the right to construct a railroad to be known as the 'Sonora & Baja California Railroad,' and that in consideration of such promise and agreement to convey such interest in said concession, and upon and for no other consideration whatever, said Kimball, Gordon, and Luce made and executed an instrument in writing, a true copy of which is annexed to and made a part of plaintiff's complaint herein, marked 'Exhibit B.' (4) That plaintiff Thomas L. Rogers did not on the twenty-seventh day of February, 1882, or at any other time, either convey or cause to be conveyed to said Kimball, Luce and Gordon, or to either of them, a one-fifth or any interest in or to said or any other concession; nor did said plaintiffs, or either of them, pay or give to them, or either of them, any consideration whatsoever for the execution of said instrument. (5) That after the execution of said note the Consolidated Bank indorsed said note to one Bryant Howard; and thereafter, upon the fifteenth day of May, 1886, said Howard brought suit in the circuit court of the United States for the district of Massachusetts against the plaintiffs herein, and obtained a judgment against said plaintiffs upon said note on the fourteenth day of March, 1889, which judgment was duly entered in favor of said Bryant Howard and against said Thomas L. Rogers and Ella S. Rogers, for the sum of \$7,019.97 damages and \$63.12 costs; and on the twentieth day of February, 1893, an execution on said judgment was duly issued, and upon the twenty-fourth day of February, 1893, the plaintiff Ella S. Rogers paid out of her separate property the sum of \$7,100 in full satisfaction of said execution and judgment, and said execution was thereupon returned satisfied. (6) That on the thirtieth day of September, 1886, defendant Kimball paid upon said note to said Howard, who was then the owner of said note, \$3,527.80,

being one-third of the principal and interest then due and unpaid on said note; that thereafter, and prior to the nineteenth day of January, 1889, the said M. A. Luce and James S. Gordon paid to said Howard the balance then due and owing on said note, and prior to said nineteenth day of January, 1889, said note had been fully paid and discharged. And, as conclusions of law from the foregoing facts, the court decides that the plaintiffs should take nothing by this action, and that the defendants are each entitled to judgment against the plaintiffs for their costs and disbursements expended herein. Let judgment be entered accordingly."

Exceptions are taken by appellants to each of the findings, or parts thereof, except the first and fifth. The principal question made by appellants is, however, whether the evidence justifies the finding that there was no consideration for the execution of the agreement of release and indemnity upon which the action is based. A copy of that instrument appears in our statement of the complaint, and is referred to in the third finding as "Exhibit B." In the third finding it was clearly found that there was a good consideration for the execution of said instrument, viz., the promise of Thomas L. Rogers to convey to Kimball, Luce and Gordon a one-fifth interest in the concession there mentioned. It is not necessary to cite authorities to the proposition that such promise is a good consideration. Besides, the same finding also finds that Kimball, Luce and Gordon "executed an instrument in writing, a true copy of which is annexed to and made a part of plaintiffs' complaint herein, and marked 'Exhibit B.'" That instrument is an express release of the plaintiffs from all obligation, as between the makers of the note, for its payment; and, as the release could not affect the right of the payee to look to the plaintiffs for payment, there was added the clause in which Kimball, Luce and Gordon agreed and promised to indemnify the plaintiffs in full for any loss or damage they might in any manner sustain on account of said note. This express release, being in writing, is valid and effectual without any consideration. It does not rest simply upon the presumptive evidence of a consideration arising from an instrument in writing under section 1614 of the Civil Code. Section 1541 of the same code is as follows: "An obligation is extinguished by a release therefrom given to the debtor

by the creditor upon a new consideration, or in writing with or without new consideration." This section gives to a release "in writing" the same effect as was given at common law to a release under seal, which is in general valid without reference to the consideration. This release, of course, could not affect the holder of the note, who was not a party to it, but, so far as the parties executing it are concerned, it operated to release the plaintiffs from all obligations of ultimate payment, contribution or whatever may have been their liability as between them and the other parties to the note who executed the release, and this release was immediately operative. Nor does the agreement to indemnify the plaintiffs for any loss or damage they might sustain stand upon any different footing, so far as the question of consideration is concerned, for that agreement itself would have operated as a release. "A bond or covenant to save harmless and indemnify the debtor against his debt is a release of his debt": *Clark v. Bush*, 3 Cow. (N. Y.) 151. Said third finding, therefore, found that there was a consideration for said instrument of release and indemnity, and it must follow that, if there is elsewhere a finding that there was no consideration for said instrument, the findings upon that point must be conflicting.

The only other finding in any manner referring to the consideration of said instrument is the fourth. That finding first states that Thomas L. Rogers did not at any time convey said interest in said concession to Kimball, Luce and Gordon, and adds: "Nor did said plaintiffs, or either of them, pay or give to them, or either of them, any consideration whatever for the execution of said instrument." If we are right in holding that the promise of T. L. Rogers is a good consideration, or in our construction of section 1541 of the Civil Code, the fourth finding, that Rogers did not convey, is wholly immaterial. The failure of Mr. Rogers to make the conveyance he had promised to make, even if the contract of release and indemnity required that promise to support it, would not affect its validity, at least as to Mrs. Rogers, who is the only party who has been injured, or who seeks relief against the defendants. The promise of Mr. Rogers gave the parties to whom he made the promise a right of action to compel the conveyance, and as against Mrs. Rogers, who is found by the court

to have been an accommodation maker of the note, and who never received any consideration therefor or therefrom, and who had no interest in the concession or in the railroad mentioned in the third finding, they could not, by their own failure or neglect to enforce their rights against him, create a defense to her action upon their contract by which they released her from all obligations to pay any part of said note, and agreed to indemnify her against loss or damage on account thereof. Rogers' promise to convey was a consideration only because it was a promise which they could enforce, and their failure to enforce it could affect only themselves. There was no evidence tending to impeach the existence of the concession, or of Rogers' ownership. But, aside from this, we have seen that the release, being in writing, required no consideration to support it; and, as the release could not affect her liability to the payee of the note, an indemnity against that liability was implied in the release, and it is therefore immaterial whether Rogers made the promise or not, or whether or not he performed it. The release was unconditional. It was not that, upon a conveyance being made, they would release, but the language is, "hereby releasing"; and, having thus released her, they could not reimpose upon her even the original obligation of a cosurety to contribute to the payment of the note without her consent. As will hereafter appear, the defendants paid said note to Howard after suit thereon was brought against these plaintiffs, and before judgment, and the suit was thereafter prosecuted by Howard for the benefit of the defendants in this action, but without knowledge on the part of Rogers and wife of those facts.

The fifth finding states the date at which suit was brought upon the note against these plaintiffs in Boston, the date and amount of the judgment, the issuance of the execution, and that the judgment was satisfied by Mrs. Rogers by the payment of \$7,100 out of her separate property on February 24, 1893. The sixth finding shows that on September 30, 1886, after said suit was brought in Boston, Kimball paid one-third of the principal and interest then due on said note, and that prior to January 19, 1889, Luce and Gordon paid the balance due thereon, and that "prior to said nineteenth day of January, 1889, said note had been fully paid and satisfied." This finding does not state facts from which

the legal conclusion that the defendants, or either of them, are not liable in this action, can be drawn. In any event, it can only apply to the issue made by defendant Kimball, who alone pleaded that the note had been fully paid before judgment, and that, therefore, the payment of the judgment by Mrs. Rogers was voluntary, and gave her no right of action. It is contended by respondents "that a surety cannot claim reimbursement from his principal or indemnitor for a payment made after the cause of action has been paid, barred by the statute of limitations, or otherwise extinguished against the principal." This proposition requires qualification. Neither the sixth finding nor this proposition contains the essential fact that the plaintiff knew or had information that the note had been paid.

As before intimated, counsel for respondents seem to think that Mr. Kimball's situation is so far different from that of his codefendants as to require a separate answer alleging defenses not available to them, and have devoted a portion of their brief especially to his defense. The facts upon which they claim this distinction is based are that his payment was credited in the judgment rendered against the plaintiffs in Boston; that he did not request that they be sued upon the note, or that the suit be prosecuted for the benefit of himself, Luce and Gordon; that he alone set up in his answer the defense that the note was fully paid before judgment; and that he had no notice of the pendency of the action. It is not necessary to follow the arguments of counsel upon these points in detail. We do not think any of these facts can avail him as against appellants. The release and indemnity contract was joint, not several. He is as much bound to indemnify the plaintiffs against loss or damage caused by his coindemnitors as against loss or damage caused by Howard or others. His payment, it is true, reduced the amount of the recovery against them, but he is as much bound to indemnify Mrs. Rogers as to the amount she did pay as he would have been if she had been compelled to pay the whole, and whether he received any part of the money paid by Mrs. Rogers in satisfaction of the judgment is wholly immaterial. Any inequality of payment as between the defendants is a matter of adjustment between themselves, with which plaintiffs have no concern. The only one of the points relied upon to relieve Mr. Kimball,

requiring special notice, is that he had no notice of the suit in Boston. Before the note was sent to Boston for collection, Kimball, Luce and Gordon executed a new note to Howard for the same amount, and which Howard regarded as in the nature of a collateral note, upon which Kimball's payment was made and credited. Luce and Gordon afterward paid the balance due thereon, and on January 19, 1889, Howard executed an instrument reciting that Rogers and wife had been sued upon the original note; that since the institution of the suit said note had been fully paid by Kimball, Luce and Gordon; and that whatever judgment should be recovered in his name should be for their benefit. It is claimed on behalf of Kimball that he had no knowledge of the execution of said instrument nor of the pendency of the suit. In view of the execution of the said instrument, which was prepared by Mr. Luce, and of which Gordon was informed, it is obvious that they can claim nothing upon the ground that plaintiffs did not notify them of the pendency of the suit. If the want of notice of the pendency of the suit in Boston is essential to Kimball's defense, the fact that he had or had not notice should have been found. As to whether he knew of that suit, the evidence is conflicting, and in such case the appellate court cannot supply a finding to uphold the judgment: *Smith v. Association*, 78 Cal. 289, 12 Am. St. Rep. 53, 20 Pac. 677. But, if it be assumed that he had no notice of that suit, that fact would not avail him in this action, for want of notice would not be a defense "unless it appeared that there was a defense to the suit, which the plaintiffs were informed of and neglected to interpose, or that the judgment was obtained by collusion": *Bridgeport Fire etc. Ins. Co. v. Wilson*, 34 N. Y. 275, 281. See, also, *Brandt, Sur.*, sec. 214. Plaintiffs testified that the only information of the payment made by Kimball was in the deposition of Howard taken in the Boston suit, and that their first information of the payments made by Luce and Gordon was obtained after this action was commenced. No payments appear to have been indorsed upon the original note, and if Mrs. Rogers had paid the full amount of the note upon Howard's demand, without suit, and without knowledge of the prior payment by defendants, no payments being indorsed thereon, we see no reason why she could not recover upon the defendants' express contract

to indemnify the plaintiffs for a loss "in any manner sustained on account of said note." The sixth finding, therefore, does not justify a conclusion of law that Mrs. Rogers is not entitled to recover in this action, unless it can be presumed from the bare fact therein stated that the defendants had paid the note in full before judgment; that is, that she must be presumed to have known of facts transpiring three thousand miles away, and which were carefully concealed from her, or that she permitted judgment to be taken against her knowing that she had a perfect defense. Such presumptions will not be indulged for the purpose of sustaining a judgment which upon the other findings is clearly wrong. These considerations render it unnecessary to consider the sufficiency of the evidence to justify the findings in the particulars specified by appellant. We advise that the judgment and order appealed from be reversed, with directions to the court below to enter judgment on the findings in favor of Ella S. Rogers as prayed for in the complaint.

We concur: Belcher, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, with directions to the court below to enter judgment on the findings in favor of Ella S. Rogers as prayed for in the complaint.

KNIGHT v. TRIPP.*

S. F. No. 735; August 9, 1897.

49 Pac. 838.

Gift.—A Person About to Undergo a Surgical Operation, the result of which was uncertain, transferred all her property to defendant, the real estate being conveyed by deed in due form, and the personal property, consisting of furniture, notes, clothing, etc., being transferred by a bill of sale, but no physical change in possession taking place. The intention was that the property should be used for the donor's benefit, and remain in her possession during her life, and, in the event of her death from the operation, defendant was to distribute it according to the directions of an unsigned

*For subsequent opinion in bank, see 121 Cal. 674, 54 Pac. 267.

written memorandum. Held, the donor having retained possession, and the right to expend as much of the personalty as she might need during her life, that the transaction was void as a gift.¹

Gift.—An Administrator Seeking to Recover Personal Property of deceased, held by a transferee under color of title by gift, need not make a demand therefor before instituting suit.

APPEAL from Superior Court, Alameda County; F. B. Ogden, Judge.

Action by W. H. Knight, administrator, against W. G. Tripp. After judgment for plaintiff, a new trial was granted and plaintiff appeals. Reversed.

F. E. Whitney and Reed & Nusbaumer for appellant; Welles Whittemore and Carey Howard for respondent.

TEMPLE, J.—This is an action brought by the administrator of E. L. Cook, deceased, to recover personal property alleged to be the property of the estate, and which, it is charged, is wrongfully withheld by defendant. The answer denies that the property belongs to the estate, or that it belonged to the deceased at the time of her death, or that plaintiff is entitled to the possession thereof. From the evidence it appears that the property belonged to the deceased on the thirty-first of May, 1895, and that on that and the following day certain transactions were had which defendant claims constituted a gift of said property to him, partly for his own use and partly in trust for others. Whether such was the effect of what was done is the question to be determined on this appeal. The findings and judgment were for the plaintiff, but subsequently a new trial was granted, and the plaintiff appeals from this order, claiming that the order cannot be sustained on any ground whatever.

It appears that Mrs. Cook had been a widow for about six years; that she was childless, and had an estate worth about \$25,000, of which about \$10,000 was personal property; and that she lived in her own house in Oakland, alone, except

¹ Cited and approved in *Harty v. Teagan*, 150 Mich. 77, 113 N. W. 595, where the defendant was alleged to have money, taken by him dishonestly and by force from the decedent, who was mentally incapacitated at the time. It was said such a claim did not need the interposition of equity.

Cited in the note in 99 Am. St. Rep. 896, on gifts causa mortis.

that she had some lodgers, to whom she rented rooms in her house. She died June 14, 1895, having been sick for some months. On the 29th of May, 1895, defendant called upon her at her request. She told him she was about to undergo a surgical operation, and was somewhat uncertain as to the result, and desired to see him about her business. He promised to call on the next day, and did so. She then told him that she did not like the will she had made, and had destroyed it, and wished to dispose of her property while living, and said, "I want to give all of it to you, or place all of it in your hands, and tell you those whom I want should have it." At the suggestion of defendant she sent for a lawyer, and on that day and the next her entire estate, both real and personal, was formally transferred to the defendant. The transfers were in writing, and in form were sales. The real estate was conveyed by deed which was then and there delivered; the furniture by a bill of sale, which recited a consideration of one dollar, and "other considerations to me moving, I do hereby sell and assign, transfer and deliver all my household furniture and wearing apparel, and all other personal property held or owned by me, in that certain house," etc. No delivery of the furniture was made, but the donor continued to occupy the house, and use all that she had any use for, as before. She had some promissory notes and corporate stock in a tin box which she kept in her desk. The desk was brought, the notes and stock indorsed, and by the defendant were replaced in the box and locked, the defendant retaining the key. The box was then replaced in the desk, which was also locked, the defendant retaining that key also. The desk remained in the house with the other furniture. She had some \$8,000 deposited in three different banks in Oakland. Mr. Tripp testified that she assigned the books and the money to him by written assignments on the books. The books were not produced, and we are not informed further as to what the written assignments contained. Mr. Tripp further testified: "I made a memorandum at the time of the disposition of the property. . . . It was made in the course of the conversation between Mrs. Cook and myself with regard to the disposition of the property. The deeds to the real estate, the bill of sale, and assignments of mortgages were not made until

the first day of June—the next morning.” The memorandum read as follows: “Instructions of Mrs. E. L. Cook as to the disposal of her property in the event of her death. W. G. Tripp is to have the house and lot and contents of the house at 680 Tenth street, and all other real estate, and is to pay all debts and funeral expenses, for permanent care of the cemetery lot, and such monuments as he may choose for herself and husband; to pay A. E. Jenner of Belvedere \$2,000; Fred B. Kimball, Webster City, Iowa, \$1,000; Fred W. Cook, New York, \$1,000; C. F. Nicklaus, Oakland, Cal., \$2,000; Mrs. Fannie Hilton, Oakland, \$500; Miss Grace Hilton, \$500; Miss Carrie Hilton, \$500; Mrs. Pierce, Oakland, \$1,000; Miss Maggie Gates, Oakland, \$200. Any property remaining after these instructions are carried out is to belong to W. G. Tripp. June 8, 1895. Trunk and contents in closet under the back stairs is to be delivered to Mrs. Hilton.” The defendant contends that the transfer to him was absolute, in fact a gift *inter vivos*, and was not revocable by the donor, nor defeasible by her survival. He has not delivered any of the things to the ultimate donees, but he contends that he was authorized to do so at once, and in fact that whether he did or not was not material to the complete execution of the donation. The plaintiff denies that there was any executed gift either *inter vivos* or *causa mortis*, but contends that the whole transaction was testamentary in character; that the property was placed in the hands of the defendant to hold for the donor, and in case of her death was to be delivered to the donees named; that the defendant held it as agent of the donor, and the agency was revoked by the death of the principal. He also contends that there was no sufficient delivery for the vesting of the property in the donees, either as a gift *mortis causa* or *inter vivos*.

Section 1147 of the Civil Code reads as follows: “A verbal gift is not valid unless the means of obtaining possession and control of the thing are given, nor, if it is capable of delivery, unless there is an actual or symbolical delivery of the thing to the donee.” By verbal gift is meant an oral gift—one which cannot be proven by any writing. Many different transfers are shown in this case, but all purport to be sales, or they are blank indorsements. Not one of them evidences a gift. That must be proven by oral evidence. The memorandum, though made in the presence of the al-

leged donor, was signed by no one. The means of getting possession and control must have been given; and, since the things were all capable of delivery, and there is no pretense of a symbolical delivery, it must appear that there was at the time an actual delivery of the gifts to the donees. I think it plain that the gift was not to vest absolutely except in the event of her death from the operation. She transferred all she had, but, though she knew she was in peril, she did not feel sure that her disease was mortal. She hoped to survive, but thought the issue uncertain. Had she survived, she would have been without the means of support, and, even though she had implicit confidence in the defendant, and may have felt sure that he would give her the use of the property, nearly all her money would have been parceled out to several donees. And then it appears that the defendant assured her that the transfers could easily be canceled, and says he would have returned everything to her had she recovered and requested it, and such was his intention. This is a complete surrender of his contention, for he could not return the property in case of her survival if the gifts were absolute, but would have been compelled to deliver them to the ultimate donees, whose bailee he was. And then the instructions taken down by him at her dictation provide for a disposition of her property only in the event of her death. The memorandum has every resemblance to a will except its execution. It provides for a disposition of all the property of Mrs. Cook in the event of her death. It directs the payment of her debts and funeral expenses. It contains a devise of her real estate, many legacies, and names a residuary legatee. Evidently Mrs. Cook expected to remain in the house and have the use of the furniture so long as she might live. This is not provided for in the instructions, and, if the disposition was to take effect only at her death, it was not necessary. Of course, she was to have medical aid and nursing. She had several doctors and a nurse engaged. And she directed the defendant to furnish the nurse all the money the nurse should call for. She could not know how long she might need such attention, nor what it would cost. The personal property was of the value of \$10,802.10, as the defendant testified. The cash legacies were \$8,700. The defendant has paid out \$1,800 under the instructions, and has paid none of the cash legacies or gifts. He is to erect monu-

ments to her and her husband, and to provide for the permanent care of the cemetery lot. All the real estate and the furniture was given to the defendant. It must have seemed quite possible, when these transactions were had, that the necessities of Mrs. Cook might be so great that all these legacies could not be paid. Suppose her necessities had been such that all the personal property had been required. Certainly, the defendant would have felt that she was entitled to it according to her understanding of the terms of her gift. Undoubtedly, a delivery may be made to a third person for an intended donee, but the delivery and the conditions must be such that such person will at once become the bailee of the donee. The gift will still be revocable, but the possession and present control and lawful dominion must pass from the donor to the donee. The gift may even be conditional, but one of those conditions must not be that the donor shall retain possession and the right to expend as much of it as he may require or choose to expend during life. Such a disposition is testamentary, and, unless made in accordance with the statute of wills, is void; and such, I think, was the disposition made in this case. See, on this subject, *Basket v. Hassell*, 107 U. S. 602, 27 L. Ed. 500, 2 Sup. Ct. Rep. 415; *Daniel v. Smith*, 64 Cal. 346, 30 Pac. 575.

There is no injurious error in any of the rulings at the trial against the defendant. In most cases the rulings were plainly correct, and those that may be questioned were of no consequence. There was no necessity for a demand before bringing the suit. The defendant held the goods under a claim of title, and his intention to retain them as his own was clearly manifest, and in his answer he asserts his title and denies the right of the plaintiff. The answer itself shows that the possession of the defendant was adverse. The order granting a new trial is reversed.

We concur: McFarland, J.; Henshaw, J.

HYNES v. NELSON.

January 19, 1884.

2 Pac. 36.

Appeal.—An Order of the Court, of Its Own Motion, Setting Aside a Verdict is the equivalent of an order granting a new trial, and is reviewable upon a statement on appeal; but, being a matter within the legal discretion of the trial court, this court will not interfere with it unless abuse of discretion is shown.

Malicious Prosecution—Probable Cause.—Where the Uncontradicted Evidence in a suit for malicious prosecution tends to show probable cause, and the verdict of the jury is against the instructions of the court, we cannot hold that there was an abuse of discretion in setting it aside.

A. E. Castello, W. H. Allen and Geo. W. Lewis for appellant and plaintiff; Vrooman & Davis for respondent.

McKEE, J.—The case in hand arises out of an action for malicious prosecution. There was a verdict for the plaintiff for \$5,000 damages, which the court, of its own motion, set aside under section 622 of the Code of Civil Procedure. By the provisions of that section a court is authorized of its own motion to set aside a verdict "when there has been such a plain disregard by the jury of the instructions of the court, or the evidence in the case, as to satisfy the court that the verdict was rendered under a misapprehension of the instructions, or under the influence of passion or prejudice." The order made in the exercise of that power is reviewable, upon a statement on appeal, in the same manner as an order made on motion for a new trial. An order *ex mero motu*, vacating a verdict, is therefore the equivalent of an order granting a new trial; and, as either is a matter within the legal discretion of the court that makes the order, this court will not interfere with it unless the circumstances of the case, and the principle of law applicable to them, show that there has been an abuse of discretion. It appears by the order entered that the verdict was set aside because it "was not supported by the evidence given on the trial," and because it "was contrary to the instructions of the court given to the jury." Either of these was good ground for setting the verdict aside, and the presumption is in favor of the ruling of the court.

The controlling questions in the case were the existence of malice in the prosecutor and want of probable cause for the prosecution complained of. It was necessary for the plaintiff to prove each of these things in order to recover. But the primary question was, whether the prosecution was with or without probable cause: *Grant v. Moore*, 29 Cal. 644. That was a mixed question of law and fact: of fact, for the jury, if there was a conflict of evidence, under proper instructions by the court; and of law, for the court, if the underlying facts were admitted or uncontroverted: *Potter v. Seale*, 8 Cal. 217; *Harkrader v. Moore*, 44 Cal. 144; *Anderson v. Coleman*, 53 Cal. 188.

To prove a want of probable cause, it appears, by the statement on appeal, the plaintiff gave proof of the circumstances of the prosecution, of her arrest and imprisonment under it for five days, and of the dismissal of the charge against her on motion of the district attorney; and in giving testimony in her own behalf she stated, "There was no foundation in fact for the charge made against me." To rebut that evidence the defendant called a witness who gave testimony tending to prove the truth of the charge, and that she had given to defendant information of all the facts within her knowledge as to the truth of it. Her statements the defendant testified he believed, and that believing them he fully and fairly laid them, "just as the witness told him," before his own counsel and the district attorney of the county; and that, acting under the advice of his counsel, he had the plaintiff arrested for the offense complained of, and appeared in court to testify against her; but the district attorney dismissed the case, without his procurement or consent, and without the examination of any witnesses. This testimony of the defendant appears to have been uncontroverted, and with reference to it the court instructed the jury that if the defendant, from the information given to him, believed that the plaintiff was threatening, or about to commit, a crime against him, "and, acting upon that belief, consulted his counsel, and his counsel advised him that it was a crime, and that he might and ought to have her arrested, and if, acting on that advice, and upon his belief that she was the person, he caused this warrant to be issued and this arrest to be made, then if you find these facts to be true, that would in law constitute probable cause." That was the law of the question (*Harkrader v. Moore*, *supra*;

Anderson v. Coleman, supra), and the jurors were bound to take it as the law from the court and apply it to the facts in the case. If the defendant had probable cause, the plaintiff was not entitled to recover, and as the verdict appeared to the court contrary to its instruction, we are not prepared to say there was error or abuse of discretion in setting it aside *ex mero motu*. It is the duty of a court to set aside a perverse verdict.

Order affirmed.

We concur in the judgment: McKinstry, J.; Ross, J.

BAILEY v. SLOAN.*

January 20, 1884.

2 Pac. 44.

Venue—Change.—A Defendant has a Statutory Right to Have the Place of trial changed to the county of his residence, and, there being no counter-motion to retain the cause for the convenience of witnesses in the county where it was commenced, the motion should have been granted.

J. W. Freeman for plaintiff and respondent; Robt. Harrison for appellant.

McKEE, J.—In the superior court of Kern county the plaintiff commenced an action to recover judgment upon three promissory notes, made and delivered to him in that county by the defendant in the action. After service of summons, the defendant moved for a change of the place of trial of the action, on the ground that he was, at and before the commencement of the action, a resident of the city and county of San Francisco. The motion was based upon affidavits, which established the fact of defendant's residence in the city and county of San Francisco. The fact was not controverted by the counter-affidavits filed by the plaintiff; nor was any counter-motion made by him to retain the cause in Kern County, on the ground of convenience of witnesses; but the court denied the motion. As the county designated in the

*For subsequent opinion, see 65 Cal. 387, 4 Pac. 349.

complaint was not the proper county for the trial of the action, the defendant had a statutory right to have the place of trial changed to the county of his residence. The order of the court denying the right was therefore erroneous: Code Civ. Proc., secs. 395, 397.

Order reversed and cause remanded.

We concur: McKinstry, J.; Ross, J.

BISHOP v. GLASSEN.

No. 9621; October 23, 1886.

12 Pac. 258.

Public Lands—Homestead.—Public Lands of the United States, in the Actual Occupation and exclusive possession of one party, are not subject to pre-emption or homestead settlement by another.

Appeal—Rehearing.—Where, on the Hearing in the Supreme Court, There is No Appearance for the appellant, and the judgment is affirmed, such judgment will not be vacated, for the purpose of another hearing, though a sufficient and good showing be made concerning such nonappearance, so as to authorize the court to do so, if it appears that it would be useless to do so for the reason that, upon another hearing, a like judgment must follow.

APPEAL from Superior Court, County of Contra Costa.

Ejectment. The complaint alleged, and the court found, that plaintiff had been in the peaceable possession of surveyed United States lands which were open to pre-emption; that while in such possession and the actual occupation of such lands defendant forcibly ejected plaintiff from said land, and took, and continued to the time of the action to hold, said lands unlawfully from defendant. Defendant in his answer claimed to have entered on said lands as a homestead pre-emptor, and that, after his entry, he had tendered to the United States land officer his claim for the same, together with the necessary fees, which, however, such officer had refused. The court found that such land at the time defendant entered was in the actual occupation and exclusive possession of plaintiff, and therefore not then subject to pre-

emption or homestead settlement. Judgment went for plaintiff. Defendant appealed. At the time for hearing in the supreme court the appellant failed to appear. The supreme court affirmed the judgment, as appears below, and the appellant then made a showing of the absence of his attorney from the state as ground for his nonappearance.

B. B. Newman for defendant and appellant; Mills & Jones for defendant and respondent.

By the COURT.—We have examined the transcript herein, and are of opinion that this case must be governed by the rulings of this court in *Davis v. Scott*, 56 Cal. 165, *Hosmer v. Duggan*, 56 Cal. 258, and *McBrown v. Morris*, 59 Cal. 64. This must result in an affirmance of the judgment. Conceding that the showing is sufficient to authorize the court to grant the motion here made, and vacate the judgment of affirmance heretofore rendered, it would be useless to do so where, upon the hearing, the like judgment must follow. The motion is therefore denied: *Estate of Montgomery*, 59 Cal. 584. Ordered accordingly.

HEILBRON et al. v. OAMPBELL, Judge.*

No. 13,478; March 15, 1890.

24 Pac. 1032.

Prohibition—Procedure—Demurrer and Answer.—Where respondent to petition for writ of prohibition filed a demurrer and answer, and the demurrer was overruled, and judgment absolute given against respondent on the insufficiency of his answer, when, in the absence of a motion for judgment on the pleadings, he expected that only the demurrer would be passed on, a motion to vacate the decision on the ground of surprise, and to allow an amended answer, will be granted.

S. C. Denson and A. L. Hart for petitioners.

FOX, J.—This was an application for a writ of prohibition. Upon the return of the alternative writ, the respondent

*For former opinion, see 3 Cal. Unrep. 204, 23 Pac. 122; for subsequent opinion, see post, p. 748, 24 Pac. 930.

demurred to the petition, and at the same time filed an answer. Argument was had upon the demurrer, but in the decision thereon, which was filed December 28, 1889, reference was made to the fact that a certain allegation in the petition and writ was not denied, and the decision is open to the construction that it was made upon the pleadings generally, and not simply upon the petition or writ, and the demurrer thereto. Although not so stated in terms, the legal effect of that decision was to overrule the demurrer, and give final judgment in favor of the petitioner. That judgment, in our opinion, was entirely correct upon the petition or writ and demurrer, as the legal effect of the latter was to admit the truth of allegations of the former. But an answer was in, the sufficiency of which was unchallenged; and there was no motion for judgment on the pleadings, putting the respondent upon notice that his answer was insufficient to constitute a defense. In the briefs filed after the argument, petitioner expressly claims that the hearing is upon respondent's demurrer only, and not upon the pleadings generally. It may well be that under these circumstances a final decision of the whole case was, in law, a surprise to the respondent. He has now, and in due time, moved the court to vacate the decision then rendered, pass upon the demurrer directly, and, if overruled, to allow him to file an amended answer in the cause, a draft of which, duly verified, he has deposited with the clerk of this court. This motion is made on affidavit, and on the ground of surprise. We think he is entitled to this relief, and to be heard upon the merits of the cause. It is therefore ordered: (1) That the judgment rendered in this cause on the twenty-eighth day of December, 1889, be, and the same is hereby, vacated and set aside; (2) that the demurrer of the respondent to the petition heretofore filed in this cause be, and the same is hereby, overruled; (3) that the amended answer of respondent, now deposited with the clerk of this court, be filed as and for his answer in the cause, and that, if not already done, a copy thereof be served upon attorneys for petitioner within ten days from the filing of this order; (4) that this cause be placed upon the bank calendar of this court for the May term, 1890, at Sacramento, for such further proceedings as the parties may then desire to take therein; (5) that, until the further order of this court in this cause, the respondent, J. B. Campbell, judge of the superior court of the state of

California in and for the county of Fresno, do absolutely desist and refrain from sitting or acting as judge in any proceeding had or to be had in the case of Charlotte F. Clark et al. v. August Heilbron et al., now pending in said superior court, or from making any further or other order in the cause except such as may pertain to the arrangement of the calendar of his court, or such as may be agreed to by the counsel on both sides.

We concur: McFarland, J.; Sharpstein, J.; Thornton, J.

PATERSON, J., Dissenting.—I do not see how it can serve any useful purpose to hear this matter any further. The learned judge, respondent herein, naturally feels like having nothing more to do with the case, his interests and motives being questioned, and, exercising his good taste, states to this court, in his answer, "that now that his attention is called to the fact that one of the parties to said action claims, or pretends to claim, that the land of the respondent is included within the land therein in controversy, the defendant does not intend to, and will refuse to, hear or determine any motion, or to sit or act in any proceeding whatever, therein." What is the use of issuing a restraining order when the judge thus positively states his determination not to act in the case? What good can arise from the trial of the other issues of fact? If the petitioners should fail to prove that respondent has any interest in the subject matter of the litigation, or in the success of either party thereto, the result would be the same. The judge would still refuse to act in the case. No doubt it would be gratifying to Judge Campbell to be given an opportunity to show that the allegations as to his interest in the case are groundless, and I wish it could be done. But he has already denied them under oath. There is no presumption against him; and it would only result in expense, annoyance and delay to investigate the question as to whether the petitioner or respondent is correct, and consume unnecessarily the time of this court.

demurred to the petition, and at the same time filed an answer. Argument was had upon the demurrer, but in the decision thereon, which was filed December 28, 1889, reference was made to the fact that a certain allegation in the petition and writ was not denied, and the decision is open to the construction that it was made upon the pleadings generally, and not simply upon the petition or writ, and the demurrer thereto. Although not so stated in terms, the legal effect of that decision was to overrule the demurrer, and give final judgment in favor of the petitioner. That judgment, in our opinion, was entirely correct upon the petition or writ and demurrer, as the legal effect of the latter was to admit the truth of allegations of the former. But an answer was in, the sufficiency of which was unchallenged; and there was no motion for judgment on the pleadings, putting the respondent upon notice that his answer was insufficient to constitute a defense. In the briefs filed after the argument, petitioner expressly claims that the hearing is upon respondent's demurrer only, and not upon the pleadings generally. It may well be that under these circumstances a final decision of the whole case was, in law, a surprise to the respondent. He has now, and in due time, moved the court to vacate the decision then rendered, pass upon the demurrer directly, and, if overruled, to allow him to file an amended answer in the cause, a draft of which, duly verified, he has deposited with the clerk of this court. This motion is made on affidavit, and on the ground of surprise. We think he is entitled to this relief, and to be heard upon the merits of the cause. It is therefore ordered: (1) That the judgment rendered in this cause on the twenty-eighth day of December, 1889, be, and the same is hereby, vacated and set aside; (2) that the demurrer of the respondent to the petition heretofore filed in this cause be, and the same is hereby, overruled; (3) that the amended answer of respondent, now deposited with the clerk of this court, be filed as and for his answer in the cause, and that, if not already done, a copy thereof be served upon attorneys for petitioner within ten days from the filing of this order; (4) that this cause be placed upon the bank calendar of this court for the May term, 1890, at Sacramento, for such further proceedings as the parties may then desire to take therein; (5) that, until the further order of this court in this cause, the respondent, J. B. Campbell, judge of the superior court of the state of

California in and for the county of Fresno, do absolutely desist and refrain from sitting or acting as judge in any proceeding had or to be had in the case of Charlotte F. Clark et al. v. August Heilbron et al., now pending in said superior court, or from making any further or other order in the cause except such as may pertain to the arrangement of the calendar of his court, or such as may be agreed to by the counsel on both sides.

We concur: McFarland, J.; Sharpstein, J.; Thornton, J.

PATERSON, J., Dissenting.—I do not see how it can serve any useful purpose to hear this matter any further. The learned judge, respondent herein, naturally feels like having nothing more to do with the case, his interests and motives being questioned, and, exercising his good taste, states to this court, in his answer, "that now that his attention is called to the fact that one of the parties to said action claims, or pretends to claim, that the land of the respondent is included within the land therein in controversy, the defendant does not intend to, and will refuse to, hear or determine any motion, or to sit or act in any proceeding whatever, therein." What is the use of issuing a restraining order when the judge thus positively states his determination not to act in the case? What good can arise from the trial of the other issues of fact? If the petitioners should fail to prove that respondent has any interest in the subject matter of the litigation, or in the success of either party thereto, the result would be the same. The judge would still refuse to act in the case. No doubt it would be gratifying to Judge Campbell to be given an opportunity to show that the allegations as to his interest in the case are groundless, and I wish it could be done. But he has already denied them under oath. There is no presumption against him; and it would only result in expense, annoyance and delay to investigate the question as to whether the petitioner or respondent is correct, and consume unnecessarily the time of this court.

HEILBRON v. CAMPBELL, Judge.

No. 13,478; September 3, 1890.

24 Pac. 930.

Judge—Disqualification.—The Answer of a Judge to a Petition to restrain him from further acting as judge in a case pending before him admitted that he claimed to be the owner of certain land. The petitioner, who was a party to such pending action, claimed in his petition that said land was involved in the said action pending before the judge. Held, that a prohibitory order would issue to such judge, though by his answer he declared that, his attention having been called to the fact that the land claimed by him was claimed to be involved in the suit, he would not further act in it.

S. C. Denson, Geo. R. B. Hayes and A. L. Hart for petitioner; Garber, Boalt & Bishop (Craig & Meredith of counsel) for respondent.

PER CURIAM.—This case was originally heard upon demurrer to the petition, an answer being filed at the same time. The demurrer, though not in terms, was in legal effect overruled, and a judgment final entered which was open to the construction that the same was given upon the petition and answer. Subsequently, upon motion, this decision was set aside, and the defendant was allowed to file an amended answer, and the case was placed on the Sacramento calendar for such further proceedings as counsel should be advised. Upon the call of the case, defendant moved the court for an order of reference to take testimony. This was met by a counter-motion for judgment in favor of plaintiff on the pleadings. Both motions were argued at some length, and the matter was submitted with the understanding, on the part of court at least, that counsel would confer, and see if they could agree upon issues which they deemed necessary to try, and if so upon a referee to be appointed; the plaintiff, however, insisting that he was entitled to judgment, as prayed, upon facts admitted in the amended answer.

We have not been advised of any agreement between counsel, and have therefore examined the case upon the motion for judgment. By his amended answer the defendant admits that in September, 1888, he purchased, and claims to be now the owner of, the lands embraced in swamp-land location No.

2770. This tract of land plaintiff, in his petition, claims is a part of the lands in controversy in the case of Clarke et al. v. Heilbron et al. Defendant denies that it is a part of said tract. It is thus apparent that there is a direct conflict between the parties, at least on one side, of the case of Clarke et al. v. Heilbron et al. and the judge before whom the case is pending, as to the ownership of a portion of the land included in that suit. For the reasons stated in the former opinion filed herein, December 28, 1889 (3 Cal. Unrep. 204, 23 Pac. 122), it would therefore be highly improper for him to act as judge in the case. He admits that it was his intention to act upon the hearing of any motion or proceeding that might be taken in the case, but says that now that his attention is called to the fact that it is claimed by one of the parties that the land which he claims is a part of the land involved in the suit, he will not further act in the premises, and, upon the faith of this statement, it is claimed in his behalf that this proceeding should be dismissed. Such a statement might be persuasive to the other party to make a voluntary dismissal of the case, but it does not authorize the court to order a dismissal. In view, therefore, of the fact that it appears from the answer that the defendant, Campbell, judge of the superior court of the county of Fresno, claims to be the owner of certain property claimed by the defendants, in the suit of Clarke et al. v. Heilbron et al., now pending before him, to be a part of the property constituting the subject matter in controversy, it is by the court now here ordered and adjudged that the writ of prohibition issue in this cause, as prayed, commanding the said J. B. Campbell, judge of the superior court in and for the county of Fresno, to absolutely desist and refrain from sitting or acting as judge in any proceeding had or to be had in the case of Charlotte F. Clarke et al. v. August Heilbron et al., now pending in said superior court, or from making any further or other order in the cause, except such as may pertain to the arrangement of the calendar of his court, or for the transfer of the cause to some other court or judge, or such as may be agreed upon by counsel on both sides. It is further ordered that neither party recover costs in this case.

Beatty, C. J., being disqualified, did not participate in the consideration or decision hereof.

PATERSON, J.—I dissent. There is no necessity for a prohibitory order. The judge has declared in his answer herein that he “does not intend to, and will refuse to, hear or determine any motion, or to sit or act in any proceeding whatever,” in the cause. Any prosecution of this proceeding after such a declaration is liable to be construed as an attempt to punish the judge for his past acts. I am at a loss to understand the object of the order.

LINK v. JARVIS.

No. 18,045; June 3, 1893.

33 Pac. 206.

Pleading—Amendment—Discretion.—Applications to Amend Pleadings are addressed to the discretion of the trial court, and should be allowed at any stage of the trial, when necessary for the purposes of justice.

Pleading—Form of Action.—A Complaint Which Sets Out that defendant received plaintiff's money under an agreement which he afterward refused to perform, and asks damages for the breach, does not state a cause of action sounding in tort.

Statute of Limitations—When Begins to Run.—Where Money is Given under an agreement that the person who receives it will do certain things, and he fails to perform his agreement, the statute of limitations will not commence to run against the claim of the person who gave money until there is a refusal to perform the contract.

Statute of Limitations.—Where an Amended Complaint is Filed which does not state a new cause of action, nor bring in new parties, it relates back to the filing of the original complaint, and the statute of limitations ceases to run against plaintiff's claim at the date of filing the original complaint.

Interest.—In an Action to Recover Money Given Under an Agreement that the person who received it would do certain things, where such person has refused to perform his agreement he is chargeable with interest on the sum received from the time of such refusal.

APPEAL from Superior Court, San Joaquin County;
Joseph H. Budd, Judge.

Action by Sylvester Link against Dustin Jarvis to recover money given under an agreement that defendant would do cer-

tain things for plaintiff. Judgment was rendered for plaintiff, and from such judgment, and an order denying a motion for a new trial, defendant appeals. **Affirmed.**

J. M. Kile and M. De Vries for appellant; **Loutitt, Woods & Lezinsky** for respondent.

BELCHER, C.—This action was commenced on July 12, 1889, to recover the sum of \$600, money had and received by the defendant for the use and benefit of the plaintiff. Issue was joined, and when the case came on for trial, on the objection of the defendant, the testimony on the part of the plaintiff was excluded by the court, as not admissible under the complaint. The plaintiff thereupon asked leave to file an amended complaint, and, over the objection of defendant, his application was granted, on condition that he pay all costs of the action up to the time of filing the amendment. The costs were paid, and amended complaint was filed September 18, 1890. The new complaint alleged that in October, 1887, the plaintiff gave to the defendant the sum of \$600, under an agreement that defendant would do for the plaintiff certain specified things; that plaintiff afterward demanded of defendant that he perform his agreement, but that he then refused, and has ever since refused, to do so, to plaintiff's damage in the sum of \$600, for which he asked judgment, with interest. The defendant answered to the complaint, and, among other defenses interposed, pleaded in bar of the action subdivision 1 of section 339 of the Code of Civil Procedure. The case was tried by the court, and all the findings were in favor of the plaintiff. Among other things, the court found that the plaintiff made frequent demands of the defendant that he comply with his agreement, but that he continuously neglected and delayed so to do, and on October 1, 1888, finally and absolutely refused so to do, and that the action was not barred by the section of the code pleaded. Judgment was accordingly entered in favor of the plaintiff for the sum prayed for, with interest thereon from October 1, 1888. From the judgment so entered, and an order denying his motion for new trial, the defendant appeals.

The first point made for a reversal is that the court erred in allowing the plaintiff to amend his complaint, after having proceeded to trial upon the original complaint and answer.

There was no error in the ruling complained of. The code provides that courts may allow amendments to pleadings "upon such terms as may be just" (Code Civ. Proc., sec. 473), and the rule is well settled that applications to amend pleadings are addressed to the discretion of the trial court, and should be allowed at any stage of the trial, when necessary for the purposes of justice: *Farmers' Nat. Gold Bank v. Stover*, 60 Cal. 387; *Walsh v. McKeen*, 75 Cal. 519, 17 Pac. 673; *Guidery v. Green*, 95 Cal. 630, 30 Pac. 786.

The next point is that the court erred in allowing the amended complaint to be filed, because the action was thereby changed from one *ex contractu* to one in tort. It is true that such an amendment would not be allowable, but we do not think the amended complaint states a cause of action sounding in tort. It simply sets out that defendant received the plaintiff's money under an agreement, which he afterward refused to perform, and asks damages for the breach. This no more sounds in tort than did the action for money had and received.

The point is also made that the court erred in finding that the action was not barred by the statute of limitations; and it is argued that the statute began to run when defendant received the money, and continued to run until the amended complaint was filed, and that as more than two years elapsed between those dates, the action was barred. But the statute did not begin to run until the defendant refused to perform his agreement, and that, as found by the court, was less than two years before the amendment was filed. Besides, an amended complaint relates back to the commencement of the action, if a new cause of action is not pleaded, and new parties are not brought in; and in such case the statute ceases to run when the original complaint is filed: *Barber v. Reynolds*, 33 Cal. 497; *Allen v. Marshall*, 34 Cal. 165; *Lorenzana v. Camarillo*, 45 Cal. 125.

Another point urged for a reversal is that the court erred in allowing the plaintiff interest on the amount claimed from October 1, 1888. But it was proved by the plaintiff, and found by the court, that plaintiff made frequent demands upon the defendant that he perform his agreement, and that defendant put him off, from time to time, until October 1, 1888, and then absolutely refused to perform it. If this was so, plaintiff was certainly entitled to interest from that date.

Finally, it is insisted that the findings were not justified by the evidence. It was admitted by defendant that he received \$600 of the plaintiff's money, but claimed that the money was paid to him upon conditions which justified him in retaining it. It would subserve no useful purpose to set out the testimony, but, in our opinion, the judgment cannot be disturbed on this ground.

The appeal from the judgment was taken more than a year after judgment was entered, and should be dismissed, but the order denying a new trial should be affirmed.

We concur: Vanelief, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the appeal from the judgment is dismissed and the order denying a new trial is affirmed.

DIGGS v. PORTEUS.

No. 18,017; June 7, 1893.

33 Pac. 447.

Appeal—Objections not Raised Below—Unlawful Detainer.—An objection that the legal and equitable issues on a summary proceeding for unlawful detainer were tried together cannot be raised for the first time on appeal.

Unlawful Detainer—Definiteness of Verdict.—In an Action for Unlawful detainer, a verdict that "we, the jury," find for plaintiff "that he is entitled to the possession of the premises in controversy, and assess his damages at \$——, and entitled to the sum of \$30 as rent per month," is not sufficiently definite to support a judgment for rent at the rate of \$30 per month from April 1st, the date of the termination of the lease under the notice which was conceded to have been given, to July 16th, the date the verdict was rendered.

APPEAL from Superior Court, Yolo County; A. J. Buckles, Judge.

Action by M. Diggs against S. Porteus to recover a house and lot and damages for their detention, etc. Judgment for plaintiff, and defendant appeals. Reversed, unless plaintiff agrees to strike off the money part of the judgment.

R. Clark for appellant; E. R. Bush, F. E. Baker and Byron Ball for respondent.

SEARLS, C.—Action to recover possession of a house and lot situate in Woodland, Yolo county, and damages for the detention, rents, etc. Plaintiff had judgment, from which defendant appeals. The cause comes up on the judgment-roll.

The complaint avers, in substance, among other things, that on or about May 1, 1880, one Jacob Hays, being the owner of the locus in quo, did lease and let the same to the defendant from month to month, during the will of the lessor, at a monthly rent of \$30, to be paid by defendant to the lessor, upon an agreement that defendant should vacate and surrender the premises to his lessor at any time when required so to do; that defendant entered under the lease, and is still in possession; that in January, 1891, plaintiff purchased the premises; that he is still the owner thereof; that his conveyance was duly recorded, etc.; that defendant had notice of plaintiff's purchase, and paid rent to him up to April 1, 1891, since which time no rent has been paid; that on February 20, 1891, plaintiff served defendant with written notice to vacate said premises and surrender possession to plaintiff on or before April 1, 1891, and that defendant's tenancy would terminate at said last-mentioned date, and that, if defendant failed to surrender at said time, plaintiff would claim and demand of defendant \$200 per month thereafter, and damages for detention, etc.; that, after the tenancy ceased, plaintiff demanded of defendant, in writing, a surrender of the premises, which was not complied with in three days, and has never been complied with, although more than three days elapsed before suit brought. Then follows certain allegations as a basis for special damages, not necessary to be mentioned here. Defendant filed an answer and cross-complaint, in which he denies his tenancy under the plaintiff, except under and by virtue of a lease, etc., and by his cross-complaint (in which it is asserted that Jacob Hays and Thomas Kelly have been made parties by order of the court) he avers that on June 1, 1888, Jacob Hays leased the disputed premises to Thomas Kelly, under a written lease, for a term of five years, at a monthly rental of \$35 per month, payable monthly on the eleventh day of each month, in advance, with a privilege of renewal for a further term of five years on like terms. That

Hays and Kelly subsequently agreed that said lease should be delivered to Porteus by Kelly, and that Porteus should become responsible to Hays for the rent to the extent of \$30 per month, and that he, Porteus, should be the owner and holder of the lease. That plaintiff, at the date of his purchase, had notice, and thereafter received the rent at \$30 per month. That defendant made improvements, etc. That Kelly never delivered the lease to him as per agreement, and that thereafter Hays agreed to lease to him, and a lease was prepared, but never signed; and asks that Diggs and Kelly be decreed to assign the lease to him, and that Hays and plaintiff be decreed to execute the second lease, etc. The cause was tried by a jury, and, in obedience to instructions of the court, certain questions touching the issues were answered in favor of the plaintiff, and against defendant's theory that he entered under a lease, etc. The jury further found that plaintiff was entitled to possession of the premises, and to \$30 per month as rent. The court adopted the findings of the jury; made additional findings, all in favor of plaintiff; that all the allegations of the complaint were true, except as to damages, which are fixed at \$30 per month, being the same amount agreed to be paid as rent; and judgment of restitution was entered, with \$315, being three times the rent found due.

There is not a formal assignment of errors in the transcript or brief, and it is difficult to glean from some of the objections made by counsel for appellant the precise nature of his intended contention. The first objection is that the notices given by plaintiff to defendant are based upon the theory that defendant was guilty of unlawful detainer, while the judgment is one for the nonpayment of rent. The notice of January 20, 1891, given to defendant, as specified in the complaint, was to the effect that the tenancy would expire April 1st, and required defendant to surrender the premises at that date. It contained all that is necessary under section 789 of the Civil Code, and section 1162 of the Code of Civil Procedure, to terminate the tenancy. Upon the expiration of the time specified in the notice plaintiff could have maintained an action of ejectment: *Martin v. Splivalo*, 56 Cal. 128. The residue of the notice as to instituting a suit, the recovery of damages, and \$200 per month, may, in view of the pleadings, be treated as surplusage. The second notice was in compliance with sections 1161 and 1162 of the Code of Civil Pro-

cedure, and upon the expiration of three days entitled plaintiff to maintain an action for unlawful detainer under the summary proceedings provided for in chapter 4, title 3, part 3, of the Code of Civil Procedure. The summons in the cause is not set out in the transcript, and there is nothing to indicate with certainty whether the action was intended as one in ejectment or as a summary proceeding for an unlawful detainer. The complaint, with its prayer for relief and the relief granted, are all such as warrant the inference that the latter was the object aimed at, and we shall so regard it.

It is a sufficient answer to the objections urged against the instructions to the jury that no objections or exceptions to the giving of them, or any of them, appear in the record. Nor is there the faintest suggestion that any exceptions were in fact taken.

Appellant further objects that the issues of law, and the equitable defense contained in the amended answer, and amended cross-complaint, were tried together. No doubt the better and more orderly method would be to first try the equitable issues where it can be done. In the present case, however, they were so involved by the pleadings with the legal issues that it would be difficult to segregate them. Conceding, however, that it could have been done, no request of that kind was made, and, having consented by a failure to object to the trial of all the issues, legal and equitable together, the objection made here for the first time comes too late. A general verdict was rendered in favor of plaintiff and certain questions were also propounded to the jury, all of which were answered in favor of the plaintiff. The court adopted the verdict and findings of the jury, and found, further, that the affirmative allegations of defendant's answer and of his cross-complaint were each and all untrue. These were the allegations going to establish an equitable claim. The general verdict was as follows: "We, the jury in this case, find for the plaintiff Diggs that he is entitled to the possession of the premises in controversy, and assess his damages at \$ —, and entitled to the sum of \$30 as rent per month." The court, as before stated, adopted the findings, and as a conclusion of law found, among other things, that plaintiff was entitled to "judgment against said Porteus for rent of the same at the rate of \$30 per month from and after April 1, 1891, until July 16, 1891, and that the same be trebled," etc.

April 1, 1891, was the date of the termination of the lease under the notice, which was admitted by the pleadings to have been given, and the date of the verdict, which was rendered July 16, 1891. Section 1174 of the Code of Civil Procedure provides that in cases of forcible entry and forcible and unlawful detainer the court or jury shall assess the damages occasioned to the plaintiff, and find the amount of any rent due if the alleged unlawful detainer be after default in the payment of rent, and the judgment shall be for three times the amount of the damages assessed and the rent found due. From this section it will be observed there can be no objection based upon the ground that the verdict was for rent, *eo nomine*, instead of for damages.

The only other question is, Was the verdict sufficiently certain and comprehensive to authorize the entry of judgment for the rent from April 1, 1891, to July 16, 1891, at \$30 per month? The verdict shows plainly that it was not simply for \$30, but for \$30 per month—"to the sum of \$30 as rent per month." The allegations of the complaint are that plaintiff has suffered damages in the sum of \$500 by reason of the hindrance, delay and detriment to his business, his accruing damages per month will be \$200, and prays for the sum of \$200 per month from April 1, 1891, as rent, until restitution is had, and that the amount thereof be trebled, and with a like prayer as to the other damages. The court found all the allegations of the complaint true except as to the damages, which it finds untrue, "except so far as the same includes the rent found by the jury due the plaintiff Diggs and adopted by the court." This was, in effect, a finding that rent at \$30 per month from April 1st was due the plaintiff. Section 626 of the Code of Civil Procedure provides that, "when a verdict is found for the plaintiff in an action for the recovery of money, or for the defendant, when a counterclaim for the recovery of money is established, exceeding the amount of the plaintiff's claim as established, the jury must also find the amount of the recovery." A general verdict must be certain. An uncertain verdict will not support the judgment upon an appeal. In *Watson v. Damon*, 54 Cal. 278, which was an action for the recovery of money on a contract, the verdict was as follows: "We, the jury, find for the plaintiff for the amount of contract, two thousand two hundred and fifty dollars, with interest at ten per cent. per annum from April 1,

1876, to November 15, 1877, less the amount of notes of the value of nine hundred and fifty dollars, with interest on said notes." This was held to be insufficient to support the judgment, upon the ground that the interest was uncertain, and that there was nothing in the pleadings from which it could be ascertained. In *Macoleta v. Packard*, 14 Cal. 179, the verdict was as follows: "Verdict for the plaintiff for the full sum claimed, with interest and costs of suit"; and it was held that the verdict did not support a judgment entered thereon for the principal sum claimed, and interest thereon at ten per cent per annum from April 12, 1849, to the time of judgment. This court said: "The jury should have found the interest." In *Dougherty v. Haggin*, 56 Cal. 522, the complaint alleged plaintiff to be entitled to five hundred inches of water measured with a four-inch pressure, and the verdict was: "We, the jury, find that the plaintiff is entitled to forty inches, miners' measurement," etc. It was held the verdict was too uncertain. I am of opinion the verdict in this case is too indefinite to uphold the money judgment entered thereon.

The conclusion of law by the court, and its findings upon the complaint, do not help plaintiff's case. The action was one at law, pure and simple. The defense was an equitable one. As to the defense it was the right and duty of the court to make findings of its own, or adopt the findings of the jury, or to do both at its option. It did the last, and that very properly; but, the cause having been tried by a jury, the court had no duty to perform in preparing findings. So far as plaintiff's action at law was concerned, the findings and conclusion of law as to plaintiff's cause of action must be regarded as surplusage. The judgment should be reversed, and a new trial had, unless plaintiff shall elect, within thirty days after filing the remittitur in the court below, to amend the judgment in his favor by striking out therefrom the sum of \$315, awarded to plaintiff therein, and, if he shall so elect, and consent to such amendment, then, and in that event, the judgment so amended shall stand as approved, and as a final judgment in the case.

We concur: Temple, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment will be reversed and a new trial had, unless plaintiff shall elect within thirty days after filing the

remittitur in the court below to amend the judgment in his favor by striking out therefrom the sum of \$315, and if he shall so elect and consent to such amendment, then, and in that event, the judgment as so amended shall be affirmed.

MESERVE et al. v. POMONA LAND AND WATER CO.
et al.

No. 19,112; October 10, 1893.

34 Pac. 508.

Appeal—Harmless Error.—Where the Record Shows That Evidence offered by plaintiff was admitted subject to defendant's objections, plaintiff cannot complain of the subsequent failure of the court to rule on the objections.

APPEAL from Superior Court, Los Angeles County;
Walter Van Dyke, Judge.

Action by E. A. Meserve and others against the Pomona Land and Water Company and others. There was a judgment in favor of defendants and plaintiffs appeal. Affirmed.

Chapman & Hendrick and Edwin A. Meserve for appellants; Olney, Chickering & Thomas for respondents.

PER CURIAM.—The plaintiffs claim to own, and to be entitled to divert and use upon their lands, 567/10,000 of all the waters flowing in and from the San Antonio canyon, which is located partly in Los Angeles county and partly in San Bernardino county; and they brought this action to have their title to the part of the said waters, so claimed by them, quieted, as against the defendants. The answer denied all the material averments of the complaint, and set up in bar of the action the statute of limitations. The court below found the facts and gave judgment in favor of the defendants, and the plaintiffs appeal from an order denying their motion for a new trial. The findings cover all the issues, and the principal contention of the appellants is that they were not justified by the evidence. The evidence set out in the statement is oral and documentary, and, while much of it is only briefly stated

in substance, it still extends over more than one hundred and fifty pages of the printed transcript. The facts of the case are numerous, and in many respects complicated, and to state them so they could be intelligently understood would require a long opinion, which would never be of use in any other case. Counsel on both sides have argued the questions presented at great length, and with marked ability; but to follow them, and state their points, would subserve no useful purpose. It is enough to say that, after carefully going over the record, we think the evidence must be held sufficient to justify the findings, and hence that they cannot be disturbed on appeal.

The statement contains but one specification of errors of law occurring at the trial, and that is as follows: "The court erred in not ruling upon the objections interposed by the plaintiffs to the introduction of evidence in this case, where the rulings of the court were reserved." The action of the court complained of is this: The plaintiffs offered in evidence a certain written agreement, and the defendants objected to it "on the ground that it was an agreement between other parties, and was incompetent, irrelevant and immaterial. The Court: It will be allowed, subject to your objection, and passed upon hereafter." It is said for appellants: "If the court ever ruled upon this question, it nowhere appears; and we say that the court erred in not ruling, and that we are entitled to a new trial for that reason." The word "plaintiffs," in the specification, should probably be read "defendants," for otherwise the specification would not be at all applicable. Assuming, however, that the specification is sufficient, and no ruling was made by the court upon the objections of defendants, still no error prejudicial to the plaintiffs is shown. They offered the written agreement, and the court admitted it in evidence, and, so far as appears, did not afterward exclude it. Presumptively, therefore, they got all the benefit from the agreement which they were entitled to, and have nothing now to complain of. It follows that the order appealed from must be affirmed, and it is so ordered.

HAIGHT v. TRYON.

No. 14,974; November 10, 1893.

34 Pac. 712.

New Trial.—A Notice of Motion for a New Trial, Directed against the "findings" rather than against the "decision" of the court, is sufficient, as under Code of Civil Procedure, sections 632, 633, the findings constitute the decision.

Pleading—Cross-complaint—Admission by Failure to Answer.—In an action for partnership accounting defendant filed a "cross-complaint" which related to the partnership transaction set forth in the complaint, alleged the partnership contract in somewhat different terms, and contained only matters in avoidance, or constituting a defense or counterclaim. Held, the averments of the cross-complaint were not admitted by failure of plaintiff to answer, as the cross-complaint was really an answer to the complaint, and therefore its averments were deemed controverted under Code of Civil Procedure, section 462.

Evidence—Sufficiency to Sustain Findings.—The Evidence was Insufficient to justify findings in accordance with the averments of the cross-complaint where the evidence on the part of plaintiff was positive that there was no such contract between the parties as that alleged in the cross-complaint, and defendant merely testified that the cross-complaint was true.

APPEAL from Superior Court, Del Norte County; James E. Murphy, Judge.

Action by Daniel Haight against Dennis Tryon for partnership accounting. From a judgment for defendant and an order denying a new trial plaintiff appeals. Reversed.

R. W. Miller for appellant; L. F. Cooper and Sawyer & Burnett for respondent.

BELCHER, C.—This is an action for an accounting between partners. The material facts set out in the complaint may be briefly stated as follows: On or about the first day of March, 1885, the plaintiff and defendant, at the county of Del Norte, in this state, entered into a verbal contract whereby they agreed to go into the business of buying, slaughtering and selling beef cattle and mutton sheep, and to divide the profits of the business equally between them. In

pursuance of this contract they commenced the said business, and carried it on until February, 1888, when they discontinued it. Plaintiff put into the business a certain amount of money and a certain number of cattle and sheep and certain merchandise, and the defendant put in a certain amount of money and a certain number of cattle and sheep. From the sales the plaintiff received a certain sum of money, and the defendant a larger sum. During the continuance of the business the animals were all disposed of except four head of cattle, of the value of \$100, which defendant converted to his own use. No accounting has ever been had, and there is left in the hands of defendant the sum of \$3,799.84, and \$100 for the said cattle appropriated by him to his own use, one-half of which sums is due and owing to the plaintiff; wherefore plaintiff prays for an accounting and judgment. The defendant answered the complaint, denying that he entered into the contract set out therein, and averring that on or about the twentieth day of February, 1885, at the county of Curry, state of Oregon, plaintiff and defendant entered into a verbal contract whereby they agreed to furnish Charles Tryon and Ben Adams money, cattle and sheep that they might enter into the business of buying, pasturing, selling and slaughtering beef cattle and sheep; that the profits and losses were to be shared equally between plaintiff and defendant after defendant Tryon should receive from plaintiff Haight \$1,000 per year for the use of his ranch in Curry county, Oregon. Then follow denials of most of the other allegations of the complaint, and an averment that defendant put into the business the sum of \$7,000. The answer prayed for an accounting, and that defendant have judgment against the plaintiff for the amount found due. At the time of filing the answer the defendant also filed a separate paper, denominated a "cross-complaint," in which he set forth that on or about the twentieth day of February, 1885, at the county of Curry, state of Oregon, plaintiff and defendant entered into a verbal contract whereby they agreed to furnish Charles Tryon and Ben Adams money, cattle and sheep for them to enter into the business of buying, slaughtering and selling cattle and sheep; that the cattle and sheep were to be kept on Lone ranch, a large farm in said county of Curry, then and up to November, 1888, owned by defendant, and out of the said business defendant was to receive first \$1,000 per year

for the use of said ranch or farm, and, after said sum was paid to him, the plaintiff and defendant were to share between them the profits and losses of such furnishing; that the said business was carried on by Charles Tryon and Ben Adams up to about the month of August, 1885, when plaintiff and defendant, finding they were losing money, took it away from them, and continued and carried it on on their own account and in their own names until November 5, 1888; that the ranch was so used from February 20, 1885, to November 5, 1888, and defendant received no rent therefor; that, in addition to the use of the ranch, defendant advanced money, cattle and sheep to carry on the business, amounting with the rent of the ranch to \$7,000; that the plaintiff did not advance to carry on the business in money, cattle and sheep over \$1,057.55, and that there is due from plaintiff to defendant, under their agreement, the sum of \$5,942.45; that the business was conducted at a loss, and was discontinued on November 5, 1888, and that no accounting has ever been had; that three head of cattle remain undisposed of, one in possession of plaintiff and two in possession of defendant. The defendant then prays for an accounting of all the transactions between the parties; that he have judgment against the plaintiff for \$5,942.45; that any property remaining be sold, and the proceeds paid into court; and for general relief. The plaintiff demurred to the cross-complaint upon the ground that it did not state facts sufficient to constitute a cause of action, and the demurrer was overruled. No answer to the cross-complaint was filed. Upon the issues thus framed the case was tried, and the court found that there was due from the plaintiff to the defendant the sum of \$2,500, for which sum judgment was entered in favor of the defendant. From this judgment and an order denying his motion for a new trial the plaintiff appeals.

The notice of motion for a new trial stated that the motion would be made upon the grounds, among others, "that the evidence is insufficient to justify the findings," and "that the findings are contrary to the evidence." It is claimed by the respondent that such a notice should be directed against the "decision" of the court, and not against the findings, and hence that the notice was insufficient, and the motion was therefore properly denied. This claim is clearly untenable.

Under our statute the findings constitute the decision (Code Civ. Proc., secs. 632, 633; *Sawyer v. Sargent*, 65 Cal. 259, 3 Pac. 872), and it has been held that such a notice as that given here complies with the requirements of the code and is sufficient: *Boston Tunnel Co. v. McKenzie*, 67 Cal. 485, 8 Pac. 22.

It is further claimed that the cross-complaint was a proper pleading in the case, and, no answer to it having been filed, that its averments were admitted, and no evidence in support of them was necessary; and hence that the findings cannot be assailed for want of evidence to justify them. And upon this theory the court below seems to have based its decision, the principal averments and findings, except as to the amount due, being in almost identically the same language. This claim is also, in our opinion, untenable. The so-called "cross-complaint" was not in fact, as we think, a cross-complaint, or anything more than an answer. It related to the transaction set forth in the plaintiff's complaint, the partnership between the parties, though alleging in some respects different terms, and contained only matters in "avoidance or constituting a defense or counterclaim," and was deemed to be controverted by the opposite party: Code Civ. Proc., sec. 462. And the fact that it was called a "cross-complaint" did not make it one. It is immaterial what the defendant called his pleading. Whether he designated it an "answer" or "cross-complaint," its character will be determined by the court from the facts set up: *Holmes v. Richet*, 56 Cal. 307, 38 Am. Rep. 54; *Meeker v. Dalton*, 75 Cal. 156, 16 Pac. 764; *Mills v. Fletcher*, 100 Cal. 142, 34 Pac. 637.

The only question remaining which need be considered is, Did the evidence justify the findings? We do not think it did. The evidence was oral and documentary and was quite voluminous. To state it briefly would require considerable space, and subserve no useful purpose. On the part of the plaintiff it was positive that there was no such contract between the parties as that alleged by the defendant, so far as it related to Charles Tryon and Ben Adams, and to the rent of defendant's Oregon farm, and we are unable to find anything on the other side which can be said to raise a substantial conflict upon these issues. The brief statement by defendant, as a witness, that the cross-complaint was true did not, in our opinion, have that effect. It follows that the judgment and

order should be reversed and the cause remanded for a new trial.

We concur: Temple, C.; Vancief, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are reversed and the cause is remanded for a new trial.

DAVIS v. LAMB et al.

No. 15,293; December 21, 1893.

35 Pac. 306.

Administrator.—A Judgment in an Action Against an Administrator that is entered against him personally will be corrected on appeal therefrom, as the error is one that is apparent on the judgment-roll.

Administrator.—A Judgment in an Action Against an Administrator that is made immediately enforceable will be corrected on appeal therefrom so as to make it payable "in due course of administration," as required by Code of Civil Procedure, section 1504, as the error is one that is apparent on the judgment-roll.

Appeal.—A Judgment in an Action on a Note for a Sum Larger than the principal and interest due on the note will be corrected on appeal therefrom, as the error is one that is apparent on the judgment-roll.

Appeal.—The Denial of a Motion for a New Trial on the Ground of insufficiency of evidence will not be reviewed where the bill of exceptions on which the motion was made contains no exception on that ground, and no specification of any particular in which it is claimed the evidence was insufficient.

Administrator.—In an Action, Tried Before the Court, on a note guaranteed by defendant's intestate, error cannot be predicated on the consideration of the note as evidence, on the ground that it had been altered after intestate's death, where no objection was offered to its admission on such ground, and the court found the note in the form in which it was made.

Administrator.—In an Action, Tried Before the Court against an administrator on a note guaranteed by his intestate, the court's refusal to open the case after taking it under advisement, to permit the administrator to show that he demanded the production of the original note when the claim was presented to him, is a proper exercise of discretion, when it does not appear that the claim was rejected because of the nonproduction of the original.

APPEAL from Superior Court, Alameda County; F. W. Henshaw, Judge.

Action by Joseph Davis against George W. Lamb, administrator of the estate of William H. Lamb, deceased, and another, on a promissory note. Judgment for plaintiff. Defendant Lamb appeals. Modified.

Welles Whitmore for appellant; Marcus Rosenthal for respondent.

VANCLIEF, C.—Action on a promissory note made by the defendant Larabee to A. Davis & Son, and indorsed by the decedent as guarantor. The plaintiff is a member of the firm of A. Davis & Son, and sues as assignee of the note. The defendant Larabee was not served with summons. The court found in favor of plaintiff on all the issues of fact, and, among other things, found the note to have been made and indorsed in the following form:

“\$400.00.

San Francisco, Oct. 19, 1889.

“Two months after date ——— promise to pay to the order of A. Davis & Son four hundred dollars, for value received, with interest at ——— per cent per ——— from ——— until paid, both principal and interest payable only in United States gold coin; and in case suit is instituted to collect this note, or any portion thereof, ——— promise to pay such additional sum as the court may adjudge reasonable as attorney’s fees in said suit.

“C. E. LARABEE.”

As conclusions of law the court found as follows:

“(1) That by the terms of said promissory note the defendant Larabee promised to pay to the order of said A. Davis & Son, two months after its date, the sum of four hundred dollars, with interest thereon from its date at the rate of seven per cent per annum, and, in case suit should be instituted to collect said note or any part thereof, such additional sum as the court should judge reasonable as attorney’s fees in such suit. (2) That the said note was a non-negotiable instrument, and the said William H. Lamb, by such indorsement, became a guarantor of such note, and guaranteed the payment by said Larabee of the amount of said note. (3) That by reason thereof the plaintiff is entitled to judgment against the de-

fendant George W. Lamb, as administrator of the estate of William H. Lamb, deceased, for the sum of four hundred dollars, with interest thereon at the rate of seven per cent per annum from the 19th day of October, 1889, and costs of suit, such judgment to be payable in the course of administration of the estate of the said William H. Lamb, deceased; and it is ordered that judgment be entered accordingly.

"Done in open court this 14th day of May, 1892,

"F. W. HENSHAW,

"Judge."

Thereafter, on June 13, 1892, the clerk entered judgment on the findings as follows:

"Wherefore, by reason of the law and by the finding aforesaid, it is by the court here ordered, adjudged, and decreed that plaintiff do have and recover of and from the defendant George W. Lamb the sum of five hundred and twenty-six and 40/100 dollars, and costs taxed at \$72.00.

"Judgment entered June 13, 1892.

"JAMES E. CRANE,

"County Clerk.

"By ROBERT EDGAR,

"Deputy Clerk."

The defendant Lamb appeals from the judgment and from an order denying his motion for a new trial.

Unquestionably, the judgment is erroneous in the following respects: First, it is against George W. Lamb personally, whereas it should have been against him as administrator of the estate of William H. Lamb, deceased, in which character he is sued; second, it is enforceable immediately, instead of being payable "in due course of administration," as required by section 1504 of the Code of Civil Procedure; third, it is for a sum (\$526.40) exceeding the amount of the principal and interest of the note at the time it was rendered by about \$53. All these errors are plainly apparent on the judgment-roll, and may be corrected on the appeal from the judgment. On the appeal from the order denying the motion for a new trial, however, no error is made to appear. The motion was made on a bill of exceptions, proposed and settled after judgment, which contains no exception on the ground of insufficiency of the evidence, and no specification of any particular in which it is claimed the evidence is insufficient. Nor

does the bill of exceptions show on what ground the new trial was asked. A paper purporting to be a notice of motion for a new trial is printed in the transcript, but it is not in, nor referred to by, the bill of exceptions, nor does it purport to have been served; and, since it is no part of the judgment-roll, it forms no part of the authenticated record. It must be presumed, therefore, that the evidence justified the findings of fact: *Jones v. Shay*, 50 Cal. 509; *Watson v. Railroad Co.*, 50 Cal. 523; *Bonner v. Quackenbush*, 51 Cal. 180; *Perham v. Kuper*, 61 Cal. 331; *Coglan v. Beard*, 67 Cal. 304, 7 Pac. 738. The bill of exceptions sufficiently specifies several alleged errors in law.

1. It is claimed that the note sued on should have been rejected and held void, for the reason that it had been altered after the death of William H. Lamb. In the note, as set out in the complaint, all the blanks appearing in it, as found by the court, are filled in so that instead of reading, "with interest at ——— per cent per ——— from ——— until paid," as found by the court, it reads as follows: "With interest at four per cent per month from date until paid." In this form, with the blanks so filled, the note was offered in evidence by plaintiff, and admitted by the court without objection, on the ground that it had been altered by filling these blanks, though it was objected to on other grounds not tenable. After it had been admitted in evidence, it appeared by other evidence on the part of the plaintiff, including the testimony of the plaintiff himself, that these blanks had been filled after the death of William H. Lamb; and one of the plaintiff's witnesses testified that all the alterations were in the handwriting of the plaintiff. Thereupon plaintiff testified that he did not make nor authorize the alterations, and made an explanation of how they might have been made without his fault or knowledge, which explanation, it must be admitted, seems lame and unsatisfactory. Yet the defendant did not move to strike out the note, nor make any objection to it, on the ground that it had been altered by filling the blanks. As we have seen, the court found the note in the form in which it was made, disregarding the alterations; and, in the absence of any specification of insufficiency of evidence, it must be presumed that the evidence justified this finding; and, since there was no objection to the note as evi-

dence on the ground that it had been altered by the filling of the blanks, the court did not err in considering it as evidence.

2. The case was submitted to the court on briefs to be filed by both parties within twenty days. After the briefs had been filed, and while the court held the case under advisement, the defendant's attorney moved to open the case for the admission of additional evidence on the issue as to whether the defendant had demanded the production of the original note at the time a copy of it was presented to him, as administrator, for allowance; and it is contended that the court erred in denying this motion, but I think otherwise. The proposed additional evidence was merely cumulative. Besides, it does not appear that the claim was rejected by the administrator on the ground that the original note was not presented. Under the circumstances, I think the refusal of the court to open the case was clearly within the bounds of its discretionary power, and not an abuse of such power.

The other points made by appellant are not sufficiently plausible to require special consideration. I think the cause should be remanded, with instructions to the court below to modify the judgment as indicated in this opinion; and, although this relief might have been obtained by motion in the trial court, I think, upon consideration of all the circumstances, the costs of the appeal should be taxed to respondent.

We concur: Searls, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the cause is remanded, with instructions to the court below to modify its judgment as above indicated, and, as so modified, the judgment and order are affirmed. The costs of the appeal are to be taxed to respondent.

LORD v. THOMAS et ux.

No. 18,220; March 29, 1894.

36 Pac. 372.

Res Judicata.—In Ejectment Against Several Defendants a Judgment in a former action between plaintiff and one of the defendants, offered generally against all, is inadmissible, unless they are privy in estate and bound by such judgment.

Res Judicata.—A Prior Judgment is Conclusive upon the Parties Only as to matters actually and necessarily decided therein.

Ejectment—Evidence.—Upon an Issue That Plaintiff's Grantor had taken title for the joint benefit of himself and defendants, and that plaintiff took title from him with notice of defendants' rights, it is competent to show the circumstances of the purchase by such grantor, and his declarations at that time, as tending to show defendants' interest.

APPEAL from Superior Court, Stanislaus County; William O. Minor, Judge.

Action in ejectment by William J. Lord against Stephen Thomas and Annie Thomas. From a judgment for defendants, plaintiff appeals. Affirmed.

R. C. Minor and Eastin & Griffin for appellants; P. J. Hazen for respondents.

HAYNES, C.—Action in ejectment to recover possession of two acres of land in Stanislaus county. The complaint is in the usual form. The answer, after denying the allegations of the complaint, for a second defense alleged that defendants were tenants in common with the plaintiff, and were entitled to possession as such, and that they did and always had permitted plaintiff to have possession as such cotenant. For a third defense, they alleged that in April, 1885, Joseph Lord, the father of the plaintiff, agreed with defendant Stephen Thomas to purchase the demanded premises (which were then about to be sold at administrator's sale), for himself and Thomas, each to have an undivided one-half interest therein; that Joseph Lord bought the premises pursuant to said agreement, that Thomas paid a part of his proportion of the purchase money, and Lord advanced the remainder, and took a conveyance thereof in his own name for the benefit of himself and Thomas, and thereafter held the title in trust for the benefit of both; that defendant went into possession as such cotenant in his own right, and had ever since occupied the premises as such cotenant; and that plaintiff took a conveyance of the whole of the premises from his father, Joseph Lord, with full knowledge of said facts and of the rights of defendants therein. Special issues were submitted to the jury covering the controlling facts alleged in the third defense, all of which were found in favor of de-

fendants, and those were adopted by the court, and full findings on all the issues were added, and defendants had judgment. The plaintiff's motion for a new trial was denied, and this appeal is from the judgment and the order denying a new trial.

The principal question arises upon the exclusion of certain evidence offered by the plaintiff. On January 25, 1890, the plaintiff, William J. Lord, commenced an action in the superior court against Stephen Thomas, one of the defendants herein, upon two causes of action: one for the recovery of rent for the same premises involved in this action from April 28, 1888, to January 20, 1890, at \$9 per month, amounting to \$183, and in the second cause of action, which was for unlawful detainer, sought to recover possession of the same premises, alleging a written lease made January 20, 1890, for three months at \$10 per month, and that notice to quit was served April 22, 1890. The answer of defendants in that case, in addition to denials, alleged substantially the same facts set up in the third defense in this action, and, as to the written lease alleged in the complaint, answered that it was intended as an acknowledgment of plaintiff's interest in the premises as tenant in common, and an agreement to pay rent for such interest, and that under said lease he paid the rent up to May 20, 1890. That action was tried by the court without a jury, and resulted in a judgment for plaintiff for \$183 upon the first cause of action, and against the plaintiff on the second, upon the ground that the lease had been extended by receiving rent beyond the term, and for want of the proper notice. The findings were very full, and to the effect that the defendant never had any ownership as tenant in common or otherwise, that he had always occupied the premises as the tenant of the plaintiff and his grantor, at a monthly rental of \$9 up to the date of the written lease, and that said lease was of the entire property, and not of an undivided interest.

Upon the trial of the present action, the plaintiff offered in evidence in chief the judgment-roll in said first action, upon the ground that it was an estoppel. Defendant objected that, if relied upon as an estoppel, it should have been pleaded, and made the further objection that it was irrelevant, immaterial and incompetent, and that the judgment in that case is not inconsistent with the defense in this. I think the evidence was properly excluded. The judgment-roll offered

in evidence was in a case against Stephen Thomas alone. In this action his wife was made a defendant, and the complaint alleged that "the defendants are in possession, . . . and wrongfully withhold," etc. The offer was general, and was not restricted to the defendant Stephen Thomas. It constituted no estoppel as against Annie Thomas. It does not appear that she claimed by title acquired subsequently to that judgment, or that she is in any sense a privy in estate affected in any manner by the judgment offered in evidence. The effect of a judgment as an estoppel is declared by subdivision 2, section 1908 of the Code of Civil Procedure. The plaintiff was not required to plead the former judgment in bar, but the form of the plea, if it had been pleaded, would have indicated the circumstances under which he could use it in evidence. If pleaded, it must appear, not only that it was upon the same cause of action, but between the same parties or their privies; and hence, where it is pleaded against one not a party to the former record, the facts showing that such party is bound must be pleaded, and, if used in evidence against such party without being pleaded, the facts showing that such party is bound or estopped by the judgment must first be given in evidence. There is nothing in the record to rebut or contradict the supposition that Thomas may have conveyed his entire equitable interest in the property to his wife before the former action was commenced. But, were it otherwise, we think the evidence was properly excluded. Two causes of action were stated in the complaint in the first suit. Upon the second cause of action, which was in forcible detainer, the judgment was not upon the merits, and it must have been against the plaintiff, whatever the facts as to the ownership may have been; and no findings as to ownership were necessary to support the judgment, or were in any manner pertinent. The first cause of action was for the recovery of rent under an alleged verbal lease. Some uncertainty as to what the issues were upon the first cause of action arises from the failure of defendant to specify the causes of action to which his defenses were intended to apply. Under the first cause of action, the right to the possession of the premises was not involved, and under the evidence disclosed by the record in the present case, and consistently with the facts alleged by the defendant in his second defense in the former case, and in his answer in this, that judgment upon the first cause of action was sustain-

able, even if the facts as to the tenancy in common had been found to be as alleged by defendant. He had been in the sole possession of the premises, conducting a saloon business thereon in which the plaintiff had no interest, and also occupied the premises with his family; and, whether there had been an express leasing or not, the plaintiff was entitled to compensation for the use of his undivided interest in the property. The fact there directly decided was that the plaintiff was entitled to rent at the rate of \$9 per month for the time claimed; and, as to that fact, and as to facts which it was necessary to decide as the groundwork or foundation of the fact directly adjudged, the judgment is conclusive as between the parties thereto and their privies (*Reg. v. Inhabitants of Hartington Middle Quarter*, 4 El. & B. 793); or, as stated in Code of Civil Procedure, section 1911: "That only is deemed to have been adjudged in a former judgment which appears upon its face to have been adjudged, or which was actually and necessarily included therein, or necessary thereto." "The true doctrine is that facts found sufficient to uphold the decree conclude the parties and nothing else": *Coit v. Tracy*, 8 Conn. 268. See, also, *Bosquett v. Crane*, 51 Cal. 507; *People v. Johnson*, 38 N. Y. 63.

Some other exceptions were taken by appellant which are noticed in his brief, one of which is that the court erred in permitting the witness Joseph Lord to testify on cross-examination as to when and how he obtained title to the demanded premises. This witness, when examined in chief, produced, and there was read in evidence, a deed from himself to the plaintiff, evidently for the purpose of showing title in the plaintiff, and this was followed by the introduction of a lease from the plaintiff to defendant Stephen Thomas, made after the conveyance. The witness had testified without objection that defendant were in possession before the execution of the lease, which bore date January 20, 1890. I think it was entirely proper on cross-examination to show, as was shown by the answers of the witness, that he acquired the title in 1885, and that defendants went into possession a month or two thereafter, thus showing that their entry was not under the lease given in evidence, and was prior to the title shown in the plaintiff. The witnesses John Roberts, Captain James and Annie Thomas were properly permitted to testify to statements made by Joseph Lord at the time he bid off the prop-

erty in question, tending to show that the purchase was made for himself and Thomas. The plaintiff acquired his title from Joseph Lord, and it was alleged that he had full knowledge of the circumstances under which his grantor obtained title; and the testimony of these witnesses tended strongly to show, by the statements and admissions of Joseph Lord at the time of the transaction, that defendants had an interest in the purchase to the extent of an undivided one-half of the property.

I have examined the other exceptions taken, but find no prejudicial error in any of them. The point that the evidence is insufficient to justify the findings is not well taken. The judgment and order appealed from should be affirmed.

We concur: Belcher, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

FLECKENSTEIN v. PLACER COUNTY.

No. 18,298; September 29, 1894.

37 Pac. 931.

Fees of Constables—Construction of Statute.—Statutes of 1893, page 452, section 184, subdivision 17, which declares that subdivision 14 of the act (fixing the fees of the constables) shall apply to present incumbents, applies to a constable of Placer county holding office at the time of the passage of the act.

Fees of Constables—Constitutionality of Statute.—Statutes of 1893, page 452, section 184, subdivision 14, providing that the fees allowed constables for services in criminal actions other than felonies shall not exceed \$75 for any one quarter, is not in conflict with constitution, article 11, section 5, which makes it the duty of the legislature to regulate the fees of officers in proportion to their duties. Nor does such provision conflict with constitution, article 4, section 25, prohibiting local and special legislation affecting the fees of any officer.

APPEAL from Superior Court, Placer County; J. E. Prewett, Judge.

Action by one Fleckenstein against the county of Placer to recover constable's fees. Judgment was rendered in favor

of plaintiff for less than the amount claimed by him, and he appeals. Affirmed.

A. K. Robinson and F. P. Tuttle for appellant; L. L. Chamberlain for respondent.

DE HAVEN, J.—This action was brought by the appellant, a constable within the county of Placer, to recover from that county fees for services rendered by him as constable in criminal cases other than felonies. The amount demanded in the complaint is the sum of \$573.10, with interest from July 1, 1893. A judgment was rendered in the superior court in favor of plaintiff, but not for the full amount claimed. The plaintiff appeals. It is conceded by appellant that the judgment is in accordance with subdivision 14 of section 184 of the county government act approved March 24, 1893 (Stats. 1893, p. 452), and that the judgment must be affirmed if that provision of the act is constitutional, and applies to constables in office in the county of Placer at the date of its passage.

1. Subdivision 17 of section 184 of the act above mentioned declares that "the provisions of subdivision 14 of this section shall apply to present incumbents." This language clearly refers to those holding the office of constable in that county at the date of the passage of the act. It can mean nothing less, and its effect is not destroyed by the fact that the main body of the act of which section 184 is a part does not, except as in the act "otherwise provided," take effect until the first Monday after the first day in January, 1895. It is the intention of the act that subdivision 14 of section 184 should take effect immediately upon its approval.

2. Subdivision 14 of said section 184 is not unconstitutional. It provides that constables shall have the "fees allowed by the general fee bill of 1870, provided that the amount allowed by the board of supervisors for services in criminal actions and proceedings other than felonies shall not exceed seventy-five dollars for any one quarter." This provision is not in conflict with section 5 of article 11 of the constitution of this state, which makes it the duty of the legislature, among other things, to regulate the fees of officers "in proportion to their duties": *Green v. County of Fresno*, 95 Cal. 329, 30 Pac. 544. Nor is the law under consideration local and special, and for that reason forbidden by the constitution: *Longan v. County*

of Solano, 65 Cal. 122, 3 Pac. 463; Cody v. Murphey, 89 Cal. 522, 26 Pac. 1081.

The other points urged by counsel as grounds for a reversal of the judgment do not require special discussion. Judgment affirmed.

We concur: McFarland, J.; Fitzgerald, J.

LOWER KINGS RIVER RECLAMATION DIST. NO. 531 v.
PHILLIPS.

No. 18,363; March 11, 1895.

39 Pac. 634.

New Trial.—Assignments of Error, on a Motion for a new trial, in sustaining objections to and refusing to receive certain evidence, will be disregarded where they are not supported by the record, which shows that the court overruled all objections to and admitted such evidence.

New Trial.—Assignments of Error, on Motion for New trial, that the court erred in rendering judgment in favor of defendant, when the decision and judgment should have been for plaintiff, will be disregarded under Code of Civil Procedure, section 659, because of being a mere general objection to the final judgment.

APPEAL from Superior Court, Tulare County; William W. Cross, Judge.

Action by Lower Kings River Reclamation District No. 531 against P. C. Phillips to recover an assessment by such district upon defendant's land situated therein. From a judgment in favor of defendant, and denial of a new trial, plaintiff appeals. Affirmed.

S. C. Denson and Bradley & Farnsworth for appellant; Daggett & Adams for respondent.

VANCLIEF, C.—The plaintiff is a corporation purporting to have been organized under provisions of Political Code, section 3446 et seq., for the reclamation of swamp and overflowed lands situate in the counties of Fresno and Tulare, the proceedings for the formation of which were initiated by petition to the board of supervisors of the county of Fresno. The

object of this action is to recover from defendant an assessment of \$1,098.18, levied upon a tract (two hundred and sixty-seven acres) of his land situate in the county of Tulare, where this action was tried. The complaint is in the ordinary form, specially alleging all facts necessary to show that the district was duly organized, that the assessment was properly levied, and that defendant had refused to pay the assessment; but was not verified. The answer of the defendant admits that he is the owner of the land alleged to have been assessed to him, but denies all other allegations of the complaint. It then alleges, substantially, the following further defenses: (1) That the lands assessed to him are not, and never have been, swamp or overflowed lands, but always have been high and dry lands originally owned by the government of the United States and never granted to the state of California; and that defendant's grantor purchased said land directly from the government of the United States as not being swamp or overflowed lands, but duly segregated therefrom by the government surveys. (2) That the commissioners appointed to view and assess said lands were not disinterested persons; that one of them, F. A. Blakely, was interested, and therefore disqualified to act as such commissioner, because he was secretary of the board of trustees of plaintiff under a salary at the time he was appointed, and during all the time he acted as such commissioner. (3) That the commissioners did not view the lands of defendant, and did not assess them in proportion to the whole expense of the works and to the benefits resulting from such works; but, on the contrary, arbitrarily assessed the lands of the defendant without regard to any benefit to them resulting from said works; and that said works do not and will not benefit defendant's lands in any form, or to any extent whatever. Other defenses, more or less technical, were pleaded, but need not be considered. While the court found that the district was duly organized, it found for the defendant upon all other material issues, and thereupon rendered judgment in favor of the defendant.

The plaintiff has appealed from the judgment and from an order denying its motion for a new trial. On the appeal from the order counsel for appellant contends that the court erred in matters of law, and that the evidence is insufficient to justify the findings of fact. The motion for new trial was made on a statement of the case, which contains only the following

specifications of error either in law or in fact: "The plaintiff now assigns the following errors of law occurring upon the trial: 1. The court erred in sustaining defendant's objections to the assessment list offered in evidence by plaintiff, a copy of which is contained in the foregoing statement, and designated 'Exhibit N.' 2. The court erred in sustaining defendant's objections to and in refusing to receive in evidence the original assessment list of Lower Kings River Reclamation District No. 531, as made and returned by F. A. Blakely, W. J. Newport and Frank Laning, commissioners appointed for that purpose by the board of supervisors of Fresno county. 3. The court erred in ruling and deciding that the assessment-roll offered in evidence was indefinite, and that the same did not contain sufficient descriptions of the real estate therein described or attempted to be described. 4. The court erred in finding and deciding in favor of the defendant, when the finding and decision should have been in favor of the plaintiff. 5. The court erred in rendering judgment in favor of the defendant when the judgment should have been in favor of the plaintiff." There is no warrant in the record for the first three of these specifications, since it does not appear that the court sustained any objection to the assessment lists. On the contrary, the court overruled all objections thereto, and admitted both the original assessment-roll filed in the county of Fresno, and a copy thereof filed in the county of Tulare. Nor does it appear that the court ruled or decided that the assessment-roll offered in evidence was indefinite, nor that it did not contain sufficient descriptions of the real estate therein described or attempted to be described, as stated in the third specification of error. Neither the fourth nor fifth assignment of error is a specification at all of any error in law "occurring at the trial," or of any particular in which the evidence is insufficient. Each is but a general objection to the final judgment. Therefore the statement on motion for new trial must have been disregarded (Code Civ. Proc., sec. 659), and the motion was properly denied. On the appeal from the judgment it is enough to say that the findings of fact undoubtedly support the judgment. I therefore think the order and judgment appealed from should be affirmed.

We concur: Belcher, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order and judgment appealed from are affirmed.

SANTA PAULA WATERWORKS v. PERALTA.*

L. A. No. 18; October 21, 1895.

42 Pac. 239.

Appeal—Filing Brief—Excuse for Failure.—Where appellant's failure to file a brief was due to a misunderstanding between two attorneys as to which was to act for him in the supreme court, and he, through his ignorance of English, was excusable for that misunderstanding, the appeal not being in the opinion of counsel without merit, respondent's motion to dismiss will be denied.

APPEAL from Superior Court, Ventura County; B. T. Williams, Judge.

Action by the Santa Paula Waterworks against Julia Peralta, in which judgment was rendered for plaintiff, and defendant appealed. For the failure of appellant to file a brief respondent entered a motion to dismiss the appeal. Denied.

Daly & Toland, R. F. Del Valle and Shepherd & Eastin for appellant; W. H. Wilde and Orestes Orr for respondent.

PER CURIAM.—Motion by respondent to dismiss the appeal for failure of appellant to file a brief. We think it sufficiently appears from the affidavits filed by appellant in resistance of the motion that the failure to file the brief arose from a misunderstanding between appellant and his counsel as to whom appellant desired to represent him in this court. Daly & Toland were the attorneys for appellant in the lower court. After the appeal was perfected, appellant, who is a Spaniard, and speaks and understands English very imperfectly, informed Mr. Toland, as the latter understood him, that he intended to get Mr. J. L. Murphy, of Los Angeles, to attend to the case in the supreme court. Subsequently appellant called on Mr. Murphy and told him that he wished to secure his assistance in the case on the appeal. He was informed by Mr. Murphy that he would assist in the case if agreeable to Daly & Toland, and suggested that appellant see the latter on the subject. Appellant, it seems, did not understand the suggestion as to the necessity of his seeing Daly & Toland, and went away in the belief that he had done

*For subsequent opinion, see 113 Cal. 38, 45 Pac. 168.

all that was required and necessary in the premises to secure the services of Mr. Murphy. The latter did not understand appellant that he was expected to take control of the case to the exclusion of Daly & Toland, but simply to assist them in the preparation of the brief and the presentation of the case in this court. Some correspondence subsequently occurred between Murphy and Toland upon the subject, which does not appear to have assisted to the better understanding of the appellant's desires in the premises, and, as a result, each attorney waited for the other to act, and no brief was filed. The affidavits made it clear that the appellant at all times and in good faith intended to prosecute his appeal, and supposed that everything necessary thereto was being done by his attorneys; and it also appears that, in the judgment of counsel, there is merit in the appeal. The whole misapprehension and misunderstanding of the attorneys would seem to have arisen from the imperfect ability of the appellant to make himself understood by reason of his lack of familiarity with the English language. Under the circumstances, we think a case of excusable neglect is disclosed which should entitle appellant to present his cause on the merits; and in this view the motion to dismiss should be denied. It is so ordered.

FORD v. KENTON et al.

No. 19,436; July 2, 1895.

40 Pac. 1031.

Promissory Note—Forgery as a Defense.—The fact that nothing was heard of a defense that an indorsement on a note was a forgery until the maker had absconded does not estop the party from asserting it, especially where there was evidence that he did not know that he was held liable until suit was commenced.

Promissory Note—Defense to Liability as Indorser.—In an action to hold one liable as an indorser, evidence that defendant was seventy-five years old, and unable to read or write; that he never authorized the indorsement, but only authorized his name to be written on an undertaking for a small amount, is sufficient to sustain a verdict that defendant did not indorse the note.

Evidence.—The Reception of Inadmissible Evidence over appellant's objection is not reversible error where it was afterward stricken out on appellant's motion.

Pleading—Amendment.—Granting Leave to Amend Pleadings at the trial will not be reversed except for abuse of discretion.

APPEAL from Superior Court, San Luis Obispo County; V. A. Gregg, Judge.

Action by Joseph A. Ford against Thomas Kenton and another on a note. Defendants had judgment and plaintiff appeals. Affirmed.

Wilcoxon & Bouldin and J. M. Wilcoxon for appellant; Graves & Graves for respondents.

BELCHER, C.—In October, 1892, A. Sittenfeld and O. Mandershied were partners, doing business at Paso Robles under the firm name of A. Sittenfeld & Co., and were indebted to numerous merchants in San Francisco in sums aggregating \$8,900. They were in financial trouble, and desired an extension of time to pay their debts. To obtain such extension, they executed a promissory note for the full amount of said indebtedness, payable to the order of A. Sittenfeld, in four equal installments, in three, six, nine and twelve months. The payee indorsed and delivered the note to the representative of the San Francisco creditors, and he delivered it to the plaintiff. Before the note matured, the makers thereof failed and went into insolvency. In due time the plaintiff commenced this action against the defendants, Thomas Kenton and Henry Moody, to recover the amount due on the note, alleging that they were indorsers thereof, and as such liable for its payment. The defendants answered separately, and each denied that he ever indorsed the said note. The case was tried before a jury, and a general verdict was returned in favor of both defendants, and a special verdict to the effect that Kenton did not write the signature purporting to be his on the back of the note. Judgment was thereupon entered that the plaintiff take nothing by his action against the said defendants, from which, and from an order refusing to grant a new trial, the plaintiff appeals.

The grounds relied upon for a reversal are that the verdict was not justified by the evidence, and that certain errors in law were committed by the court in its rulings. As to Kenton's signature, there was positive evidence that it was a forgery. Kenton testified that he never signed, nor authorized anyone else to sign, his name on the back of the note, and never saw the paper until it was presented in court; and an expert witness as to penmanship testified that the signature

was not Kenton's. No direct testimony to contradict this evidence was introduced by the plaintiff, and the only claim is "that this evidence, in the face of the fact that nothing was heard of such a defense until Sittenfeld, who procured the signature, had absconded, fails." But there was nothing even tending to show an estoppel, and there was proof that Kenton never knew he was held liable on the note until suit was commenced thereon. As to Moody's signature, it was proved that he was seventy-five years old, and unable to read or write even his own name, and that he never authorized his name to be written on the note, but only authorized it to be written on an undertaking for \$80 or \$90 which Sittenfeld was about to give to obtain an attachment against one Lilienthal. Under these circumstances, the judgment cannot be reversed for want of evidence to justify the verdict.

During the progress of the trial, numerous objections to evidence offered on behalf of defendant Moody were made by plaintiff, and the objections were overruled and exceptions reserved. Afterward, however, on motion of plaintiff, the evidence objected to was all stricken out. Conceding, therefore, that the rulings complained of were erroneous, still we fail to see that the plaintiff was in any way prejudiced by them.

At the conclusion of the evidence, counsel for defendant Moody asked leave to amend his answer by inserting the words: "Further answering, defendant avers that he did not sign his name to or indorse his name on the promissory note set out in the complaint." The amendment was allowed, over the objection of plaintiff, and this ruling is assigned as error. It is well settled that applications for leave to amend pleadings are addressed to the sound legal discretion of the trial court. They may be made at any stage of the case, and, whether granted or refused, the action of the court will not be disturbed on appeal unless a clear abuse of discretion appears. We fail to see any abuse of discretion in the action of the court here complained of. The judgment and order should be affirmed.

We concur: Searles, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

BAGLEY v. COHEN et al.

Sac. No. 219; September 8, 1897.

50 Pac. 4.

Contracts—Conditional Liability.—One G. contracted: "On or before sixty days, I, G., do hereby agree to pay B., or order, out of the profits realized by me from my business of packing raisins at M. during the present season, the sum of \$310 in gold coin of the United States of America." A few days thereafter G. sold his interest in the raisin business, and made no profits therefrom for that season. Held, that G. never became liable on the contract.

Guaranty—Failure of Principal's Liability.—A guaranty of the above contract read: "I, E., do hereby guaranty the payment of the foregoing note in accordance with the conditions thereof. [Signed] E. J." Held, that the guarantors were not liable on the guaranty, as the principal's liability had never attached.

APPEAL from Superior Court, Fresno County; E. W. Risley, Judge.

Action by F. S. Bagley against Edgar A. Cohen and another on a contract of guaranty. From a judgment for plaintiff, defendants appeal. Reversed.

Alfred H. Cohen for appellants; George L. Warlow for respondent.

GAROUTTE, J.—One Gould made and delivered to plaintiff the following writing:

"On or before sixty days, I, E. H. Gould, do hereby agree to pay to F. S. Bagley, or order, out of the profits realized by me from my business of packing raisins at Malaga during the present season, the sum of \$310 in gold coin of the United States of America.

"Dated Fresno, September 12, 1894.

"E. H. GOULD."

To this writing was attached the following guaranty:

"I, E. A. Cohen, do hereby guaranty the payment of the foregoing note in accordance with the conditions thereof.

"E. A. COHEN.

"By L. L. COREY, Agent.

"EDGAR A. COHEN.

"J. B. COHEN."

Plaintiff brought this action against the Cohens upon the above guaranty, and judgment was taken against them by default. They have appealed from this judgment, and attack the sufficiency of the complaint.

Upon examination of the pleading, we are satisfied that it has not strength sufficient to support the judgment. Gould's promise was to pay \$310 to Bagley out of the profits of his raisin-packing business. If there were no profits, he could not be compelled to pay from other property. His liability upon the contract was limited to payment from a particular and special fund. If no fund existed, there could be no payment. The Cohens only guaranteed to make good the promise of Gould; that is, if profits were made, the obligation should be satisfied to the extent of those profits. They gave a conditional guaranty, and that condition was dependent upon the making of profits by Gould. There had to be profits made by Gould from the business before the liability of the guarantors attached. The complaint contains no allegation that profits were made, and hence shows no liability against them.

The second count in the complaint alleges that, within a few days after this contract and guaranty were entered into, Gould sold and conveyed all his interest in the raisin-packing business, and thereby prevented the making of profits by himself. Whatever effect the conduct of Gould in this respect might have if relied upon in a proper action against him, we are not called upon to say, but we are clear that it is a matter in no manner affecting the guarantors. Their rights and liabilities were fixed when the contract was entered into, and anything done by Gould thereafter could not change them. The causes that led to the absence of profits are matters immaterial to them. If Gould had continued the business, and made no profits, there would have been no liability, and such also would have been the fact even though his conduct of the business had been most extravagant and unskillful. The fact that there would have been profits if he had not sold the business, or had conducted it in a different manner, is immaterial. The guaranty failed to touch those conditions. It only guaranteed the application of the profits in a certain way. There being no profits, the guaranty created no liability. *Cereghino v. Hammer*, 60 Cal. 235, supports these

views. It becomes unnecessary to pass upon the other questions raised by the appeal. The judgment is reversed.

We concur: Harrison, J.; Van Fleet, J.

TRUETT v. ONDERDONK.*

S. F. No. 587; September 14, 1897.

50 Pac. 394.

Dismissal of Action.—A Direction by Plaintiff to the Clerk, though sufficient to authorize him to enter a judgment of dismissal in a pending action, did not effect a dismissal, where such judgment was never entered; and the court therefore retained jurisdiction over the cause and the parties.

Dismissal of Action—Fraud in Procuring.—After the Commencement of an equitable action for a partnership accounting, the parties submitted to arbitration, and, on payment of the amount awarded to him, plaintiff executed to defendant a full release, and to the clerk a direction to enter a dismissal of the action; but no judgment of dismissal was ever entered. Plaintiff, on discovering, long afterward, that defendant had been guilty of a fraudulent suppression and misrepresentation of facts in effecting said settlement, filed a retraction of such authority to dismiss, and a motion for an order authorizing same, supported by affidavits setting out the fraudulent acts, none of which were controverted, and showing defendant's absence from the state. Defendant appeared by counsel, and filed a counter-motion for the entry of judgment of dismissal, pursuant to the previous authorization. Held, that an order refusing to vacate plaintiff's direction, and ordering the entry of judgment of dismissal, was erroneous, though such dismissal was without prejudice, where there was no showing that defendant would ever return to the state.

APPEAL from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Miers F. Truett against Andrew Onderdonk for an accounting and a dissolution of their copartnership. From a judgment in favor of defendant, plaintiff appeals. Reversed.

T. M. Osmont for appellant; Fox, Kellogg & Gray for respondent.

*For subsequent opinion, see 120 Cal. 581, 53 Pac. 26.

HAYNES, C.—The plaintiff and defendant, many years ago, were copartners as contractors for the construction of sea-walls, filling in streets, and other similar work. On March 18, 1880, the plaintiff brought an action in the superior court of San Francisco against the defendant for an accounting and settlement of the partnership affairs, the appointment of a receiver and a dissolution of the partnership, claiming that a large sum of money was due to him from the defendant, and specifying in his complaint a large number of contracts, some of which had been completed and others were in progress. The summons was issued therein, and served upon the defendant the same day. A few days afterward the plaintiff and defendant entered into an agreement to submit their differences to one Thomas W. Scott, in which it was stipulated that said arbitrator should make his award within two days from that date, and that respondent should pay the amount of the award within twenty-four hours after notice thereof. Scott made his award, finding due to the plaintiff \$32,000, and this amount was paid by the defendant, and a release was executed to him covering all matters existing between them; and on March 26, 1880, eight days after the commencement of the action, plaintiff's attorney filed in the action, and entitled therein, the following paper: "Let the above-entitled action be dismissed; and the clerk of the court is hereby authorized and directed to enter dismissal thereof without further notice. Hosmer R. McKoon, Attorney for plaintiff." No order or judgment, however, was entered upon this direction until the order and judgment from which the present appeal is taken. This appeal is from an order made and entered on the twenty-seventh day of February, 1895, directing the entry of a judgment of dismissal in said case against the plaintiff, and also from the judgment of dismissal made and entered in said action on that day.

The appeal was taken within sixty days after the entry of the judgment, and the proceedings are brought up by a bill of exceptions, from which it appears that in November, 1894, the plaintiff moved the court to have said cause set for trial, and to fix a day for the trial thereof. Said motion came on for hearing in February, 1895, T. M. Osmont appearing for the plaintiff, and N. B. Kellogg appearing for the defendant, specially for the purpose of hearing that motion and a counter-motion on the part of the defendant that judgment

of dismissal be entered pursuant to said authorization filed therein March 26, 1880, above quoted. Said motions were heard together. Defendant, in support of his motion to dismiss said action, read in evidence said authorization for dismissal; and in opposition thereto, and in support of his motion, the plaintiff read several affidavits, the substance of which is as follows: The affidavit of plaintiff, Truett, recited the purpose and character of the action brought by him against the defendant in March, 1880, for a dissolution of the partnership, and for an accounting and the appointment of a receiver; that they had been carrying on a considerable business as such partners; that the defendant had the main charge and management of the business; that he was denied access to the books of the firm, and had not full knowledge of its affairs; that, shortly after the commencement of the action, he was induced to settle the same; that his attorney filed said authorization for the dismissal of the case; that such settlement and authorization were made upon a material suppression and misrepresentation of facts by the defendant; that, by reason of such suppression and misrepresentation, plaintiff was greatly prejudiced by his consent to said authorization if the same should be held effective to dismiss the action. Said affidavit then proceeded to state as follows: That, among other suppressions and misrepresentations, the defendant caused it to be represented to plaintiff that a contract regarding the construction of a section of the Canadian Pacific Railway, in which plaintiff and defendant were mutually interested, and which had been obtained by defendant for the benefit of said firm, had been sold a short time prior to that, and for which nothing whatever had been realized for the benefit of said firm, the only consideration being that defendant was to receive a monthly salary as superintendent; that affiant, believing said representation to be true, made said settlement, and his attorney filed said paper authorizing dismissal accordingly; that, within a few weeks last past, the plaintiff has learned that said representation regarding said Canadian Pacific Railway contract was totally false; that the defendant had not disposed of the same for the consideration above named, as represented to plaintiff, but still retained an interest in said contract, out of which he subsequently realized a very large sum of money, amounting to several hundred thousands of dollars; that if plaintiff had known the facts

regarding said contract, and that the same had not been disposed of, as stated by defendant, plaintiff would never have consented to any settlement or dismissal of said action; that no part of said profits of said Canadian contract have ever been paid over to plaintiff, and, upon a just and fair accounting, defendant would be indebted to plaintiff, as plaintiff is informed and believes, in a very large sum of money. Affiant further states that no dismissal of said action has ever been entered, and no judgment of dismissal has ever been awarded, and the action is still pending in this court undetermined. Upon the discovery of the fraud above detailed, plaintiff retracted and withdrew his consent to the dismissal of said action; that the defendant has never appeared in said action, and is now absent from this state, and there is no one representing him here upon whom plaintiff can serve notice of this application; and affiant now prays that an order may be entered of record herein authorizing the withdrawal and retraction of said dismissal. Plaintiff also read the affidavit of the arbitrator, Thomas W. Scott, as to the representations of the defendant made to him as arbitrator, fully sustaining the statements contained in plaintiff's affidavit as to defendant's representations in regard to the contract for the construction of the section of said Canadian Pacific Railway, and that no credit was allowed the plaintiff on account thereof. A second affidavit was made by the plaintiff, detailing the circumstances relating to the discovery of the alleged fraud perpetrated by the defendant in said settlement, the first intimation of which he received in the spring of 1894. Plaintiff also read in evidence the following withdrawal or retraction of said authorization, entitled in said court and cause: "Now comes the plaintiff, Miers F. Truett, in the above-entitled action, and withdraws and retracts the order or authorization for a dismissal of said action filed herein by his attorney, Hosmer R. McKoon, on the 26th day of March, 1880. Dated November 1, 1894. Miers F. Truett." Plaintiff also put in evidence the summons in said action, showing personal service on the defendant, and referred to the original complaint in said action; also, the agreement of arbitration and the release executed by him to the defendant upon the payment of the award made by the arbitrator. Upon the hearing of these motions, the court made an order denying the plaintiff's motion to set the cause for trial, and granting the

motion of defendant to dismiss the action, and directing the entry of a judgment of dismissal without prejudice to a new action. These orders were duly excepted to by appellant. The facts stated in these affidavits were in no respect contradicted, and therefore, for the purposes of the present controversy, must be taken as true.

The filing of the authorization or the direction to the clerk to dismiss the action, though it would have authorized the clerk to enter a judgment of dismissal, did not operate to dismiss the action, and the court therefore retains full and complete jurisdiction over the cause and the parties. This proposition is fully sustained by the decisions of this court in the following cases: *Acock v. Halsey*, 90 Cal. 215, 27 Pac. 193; *Rochat v. Gee*, 91 Cal. 355, 27 Pac. 670; *Barnes v. Barnes*, 95 Cal. 174, 30 Pac. 298, 16 L. R. A. 660; *Brady v. Times-Mirror Co.*, 106 Cal. 56, 62, 39 Pac. 209, and other authorities cited in those cases.

It cannot be questioned that the court had the power to vacate the authorization filed by the plaintiff, and I think it equally clear that it was its duty to have done so, unless for technical reasons suggested by respondent and which will be hereafter noticed. The action was an equitable one, for an accounting, the appointment of a receiver, and the dissolution of the partnership. It is true, the defendant had not answered in the case, but summons had been duly served upon him upon the day the suit was commenced, and immediately thereafter the parties agreed to submit their matters of difference to arbitration, an arbitrator was agreed upon, his award made, the award was paid, and the plaintiff executed to the defendant a full release, comprehensive enough in its terms to embrace the matters concerning the railroad contract referred to in the affidavits. But if it be true, as alleged in the affidavits, and not denied or controverted on the part of the defendant, that the release was obtained by fraudulent misrepresentations and concealment on the part of defendant, there can be neither doubt nor question but that it was in the power of a court of equity, by some proper proceeding, to release the plaintiff therefrom, and to permit him to prosecute his action. To this proposition no authority need be cited. It involves only principles which are elementary and familiar.

It is contended, however, on behalf of respondent, that "a question of fraud cannot be tried on affidavits, or reached by

a motion." The proceeding in the court below which is under review on this appeal was not a final trial of any question of fraud, nor the vacation of a solemn release executed by the plaintiff to the defendant, but it was a presentation of facts for the preliminary purpose of removing an impediment to a trial of the matters alleged; and the question is whether, upon this presentation by affidavit, the facts, for the purposes of the motion, being undisputed and undenied, it was not the duty of the court to retain its jurisdiction, and permit the plaintiff to have these matters finally adjudicated in the action which was still pending. Such action of the court would not conclude the defendant as to the facts, nor vacate the release, nor set aside the award, but would give him full opportunity to contest and disprove the alleged fraud if the truth is not as stated in the affidavits. Whether a question of fraud can be tried on affidavits, or reached upon motion, must depend on the character and purpose of the proceeding. For the purpose of inducing some appropriate action of the court in a cause, at its inception, or during its progress, facts may be established by affidavits as the basis of its action, but which do not finally conclude the opposite party as to the truth of the alleged facts. Even a complaint by which an action is commenced may be a tissue of falsehood from beginning to end, but, if verified, may justify the court in granting a preliminary injunction against the defendant, and in all cases is effective as the commencement of an action, and puts the defendant upon his defense. There are many cases in which the court must assume the truth of facts shown by *ex parte* affidavits for the purpose of preliminary or provisional action, and this, in a very large number of cases, is absolutely essential to the administration of justice. But here, for the purposes of the action of the court now under review, the fraud of defendant, through which it is charged that the plaintiff was induced to authorize a judgment of dismissal, is admitted by the failure of the defendant to deny it, and the court below was bound to act upon the assumption that the fraud charged in the affidavits was fully established for the purposes of the motions under consideration. A more serious question would have arisen if the defendant had presented affidavits denying the fraud; but that question is not presented, and therefore need not be considered. It is not the case of a final judgment which has passed beyond the power of the court to vacate or

modify upon motion, but which can only be reached by a subsequent suit in equity. If there is a question which was involved in the action, or which arose out of it during its progress, even though it might be litigated in a new action, it can be litigated in the original action upon being properly presented by an amended or supplemental complaint. Indeed, the rule is that, if relief can be properly had in the pending action, a new action will not lie. We are fully sustained in this view by the opinion of Chief Justice Marshall in *The Hiram*, 1 Wheat. (U. S.) 440, 4 L. Ed. 131, where a rule of court had been entered upon the agreement of the parties that the case should abide the decision of the court in another case, and it was there said: "But this court is also of the opinion that, if the agreement was made under a clear mistake, the claimants ought to be relieved from it, where it could be done without injury to the opposite party. If a judgment be confessed under a clear mistake, a court of law will set the judgment aside, if application be made, and the mistake shown, while the judgment is in its power. An agreement, made a rule of court, to confess a judgment, cannot be stronger than a confession itself; and, of course, a party will not be compelled to execute such an agreement, but will be allowed to show cause against the rule in a case where it was clearly entered into under a mistake. If the judgment be no longer in the power of a court of law, relief may be obtained in chancery. Still more certainly will an agreement entered into in a suit originally depending in a court of chancery be relaxed or set aside if it be proved to the court to have been entered into under a mistake. The case cited from *Peere Williams* (*Buck v. Fawcett*, 3 P. Wms. 242) is directly in point. These principles are of universal justice, and of universal obligation."

Respondent contends, further, that plaintiff's motion was not to set aside the direction to dismiss the action, but to set the cause for trial. Plaintiff's affidavit concluded as follows: "And affiant now prays that an order may be entered of record herein authorizing the withdrawal and retraction of said dismissal." Besides, he had filed a formal retraction of the authority to dismiss, and that was read to the court upon the hearing. This relief was therefore sought, and the desired action of the court was directly prayed for. But, if it were otherwise, the defendant moved the court for an

order directing a judgment of dismissal to be entered, upon the original direction of the plaintiff, and the showing by affidavits on the part of the plaintiff may be properly regarded as heard in opposition to defendant's motion. The question was before the court. An order was made directing a judgment of dismissal to be entered, and it was entered, and that action of the court is under review upon this appeal. Plaintiff's motion to set the case for trial was premature, as it was not in condition for trial. There was no issue, and the defendant's default would, under the circumstances, have been set aside. We think the court erred in refusing to vacate the direction to dismiss the action, filed March 26, 1880, and in ordering and entering the judgment of dismissal, notwithstanding said judgment is without prejudice to a new action, since it appears the defendant is absent from the state, and there is no showing that he will ever return. Assuming, as we must, the truth of the facts alleged in plaintiff's affidavits, the defendant should not be permitted to profit by his fraud, even to the extent of compelling the plaintiff to litigate that question in a foreign jurisdiction, or in a new action in the same jurisdiction, wherein the defendant might avail himself of defenses which he could not have in this action. We advise that the judgment appealed from be reversed, with directions to the court below to vacate plaintiff's direction to dismiss the action, filed March 26, 1880, and to proceed in said cause after reasonable notice to the defendant, to be given in such manner as may be directed by the court.

We concur: Searls, C.; Chipman, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment appealed from is reversed, with directions to the court below to vacate plaintiff's direction to dismiss the action, filed March 26, 1880, and to proceed in said cause after reasonable notice to the defendant, to be given in such manner as may be directed by the court.

KUSCHEL et al. v. HUNTER et al.

Sac. No. 348; September 14, 1897.

50 Pac. 397.

Vendor's Lien—Priority Over Mechanic's Lien.—The priority of a vendor's lien over a subsequent mechanic's lien for work done on the land with knowledge of the vendor's claim is not affected by the latter's noncompliance with Code of Civil Procedure, section 1192, requiring a person having or claiming an interest in land on which an improvement is to be erected to give notice that he will not be responsible for the cost of the same.

Mechanic's Lien.—One Seeking to Establish a Lien Under Act of March 31, 1891 (Stats. 1891, p. 195), requiring corporations to pay laborers and mechanics wages due weekly or monthly on such day as shall be selected by the corporation, and giving said laborers a lien for wages not so paid, must show that his wages were payable weekly or monthly.

Mechanic's Lien.—An Allegation That Claimant "Agreed to Do Work by the month" at the "agreed rate of \$100 per month" is not an allegation that the corporation agreed to pay him monthly.

Mechanic's Lien.—A Finding of the Court That the Corporation "Promised" claimant "the sum of \$100 per month," and that it did not pay "its employees" the wages earned by them "weekly or monthly on a pay-day in each week or month selected by said company," is not equivalent to a finding that the corporation agreed to pay claimant monthly.

Appeal.—A Reviewing Court cannot Add Any Fact to the Findings of the trial court by presumption.

Master and Servant—Term of Service—Payment of Wages.—Civil Code, section 2011, declares that, "in the absence of any agreement" as to the term of service, time of payment or rate of wages, a servant is presumed to be hired by the month, at a monthly rate of wages, to be paid when the service is performed. Held, that where the evidence is not before the supreme court, it will not presume that there was no agreement as to the time a servant's wages were to be paid, in order to render available the presumption authorized by such provision of the code.

APPEAL from Superior Court, Siskiyou County; J. S. Beard, Judge.

Action by F. Kuschel and another against Harry H. Hunter and others. From a judgment for plaintiffs, defendant A. R. Campbell appeals. Affirmed.

J. H. Magoffey for appellant; Warren & Taylor for respondents.

CHIPMAN, C.—Action to foreclose a vendor's lien upon certain mining claims in Siskiyou county. Plaintiffs were the owners and conveyed the property to H. H. Hunter, one of the defendants, for the consideration of \$2,000, of which \$500 were paid in cash, and two promissory notes given for the balance. The notes falling due, plaintiffs commenced this action, and made certain holders of laborers' liens, among them appellant, and also the vendees of the property, parties defendant. The court found as to the order in which the various liens should be satisfied, placing the lien of A. R. Campbell (appellant) subordinate to plaintiffs' lien. Campbell appeals, and upon the judgment-roll alone. The pleadings are verified. The appeal is upon two grounds: (1) That no notice was given by plaintiffs that they were holders of a vendor's lien, or had any interest in the said property as required by section 1192 of the Code of Civil Procedure. (2) That the Siskiyou Mining Company, being a corporation, and having hired appellant by the month, and not having paid him on a pay-day selected by said corporation, his lien is entitled to precedence over all other claims against said property except recorded mortgages and deeds of trust.

1. The lien of a recorded mortgage or deed of trust takes priority over a subsequent mechanic's lien under section 1186 of the Code of Civil Procedure; and section 1192, requiring a person having or claiming an interest in land on which an improvement is to be erected to give notice that he will not be responsible for the cost of the same, does not apply to nor affect the interest of a prior mortgagee under a recorded mortgage: *Williams v. Mining Assn.*, 66 Cal. 193, 5 Pac. 85. In the case before us the court found that plaintiffs had a vendor's lien, and appellant does not dispute the fact. He seeks only to subordinate it to his own. It was also found by the court that plaintiffs' vendee, and the purchaser of the property from plaintiffs' vendee—the Siskiyou Mining Company—had notice of this lien and the unpaid balance due, and that appellant also had such notice during all the times he was subsequently employed by the company. A vendor's lien for the unpaid purchase price of land may be enforced against the vendee and his grantees who have notice of the

vendor's equities: *Pell v. McElroy*, 36 Cal. 268; *Combination Land Co. v. Morgan*, 95 Cal. 548, 30 Pac. 1102; *Burgess v. Fairbanks*, 83 Cal. 215, 17 Am. St. Rep. 230, 23 Pac. 292. The Siskiyou Mining Company (one of the defendants not appealing) therefore took the title from the vendee subject to this lien. The court found that Hunter purchased the property from plaintiffs for himself and others, among them defendant, and that they afterward formed the corporation to which the property was conveyed with the knowledge of defendant, and with knowledge of the indebtedness due plaintiffs. Appellant, as a lienholder under this corporation, he also having notice of plaintiffs' lien, occupies no better position. The reasoning in *Williams v. Mining Assn.* applies, I think, to the vendor's lien as well as to the lien of a mortgage, and, if this is so, it was not required of plaintiffs to post the notice required by section 1192 of the Code of Civil Procedure, appellant having knowledge of their lien.

2. Appellant, in his answer, sets up two defenses to plaintiffs' claim of priority of lien. He claims a lien under the general mechanic's lien law (Code Civ. Proc., c. 2, tit. 4, pt. 3); and he also in a further defense sets up what presumably was intended to be a claim of lien under the act of March 31, 1891 (Stats. 1891, p. 195), although the answer does not mention that act. The court apparently so treated it, and made findings, while not referring to that act, evidently having reference to it. The lien which was filed by appellant in the recorder's office contained a clause apparently having reference to this act. The act referred to is as follows:

"Section 1. Every corporation doing business in this state shall pay the mechanics and laborers employed by it the wages earned by and due them, weekly or monthly, on such day in each week or month as shall be selected by said corporation.

"Sec. 2. A violation of the provisions of section one of this act shall entitle each of said mechanics and laborers to a lien on all the property of said corporation for the amount of their wages, which lien shall take preference over all other liens, except duly recorded mortgages or deeds of trust.

....."

This act makes no provision for filing a lien under it, and, as we have found that the lien filed under the general

mechanic's lien law, so far as that law is involved, was subordinate to plaintiffs' lien, appellant gained no right, under the act just quoted, by filing his lien.

The answer alleges that defendant "entered into an agreement whereby this defendant agreed to do work and labor as a miner, by the month, upon the property of the said Siskiyou Mining Company, . . . at the agreed rate of \$100 per month, etc.; . . . that said Siskiyou Mining Company is a corporation doing business in the state of California, and that it has not paid the mechanics and laborers employed by it the wages earned by and due them weekly or monthly, on any day in each week or month selected by such corporation." The findings of the court were: That "said defendant Siskiyou Mining Company promised defendant A. R. Campbell the sum of \$100 per month for such work and labor," and "that said Siskiyou Mining Company did not pay its employees the wages earned by and due them weekly or monthly, on a pay-day in each week or month selected by said company." This act first came under review in *Keener v. Irrigation Co.*, 110 Cal. 627, 43 Pac. 14. The opinion is by Mr. Justice Harrison, in which he said: "As the remedy sought to be enforced herein exists only by virtue of the statute, it was incumbent upon the plaintiff to bring himself within the terms of the statute, and to show that the wages earned by him were 'due weekly or monthly.'" Appellant by his answer does not bring himself within the terms of the statute, as he fails to state when his wages were due. He alleges that "he agreed to do work by the month" at the "agreed rate of \$100 per month," but this is not an allegation that the company agreed to pay him monthly. His other allegation is too general and too indefinite to strengthen the pleading in this regard. The finding of the court that the company "promised defendant the sum of \$100 per month for such work and labor" is not a finding that it promised to pay that sum monthly. The evidence is not before us, and we cannot say from the finding but that the agreement was to pay quarterly, or semi-annually, or annually, and that the compensation was merely measured by the month. The presumptions we are permitted to indulge must be in support of the judgment. If there are doubts as to the meaning of the finding, they must be resolved in support of the judgment. The balance of the finding contains the vice of the answer, and is in

almost its exact language. It is general as to the employees, and is not a specific finding that the company did not pay this defendant at the time agreed upon, and, if it did, it would not cure the defect, because there is no finding as to the time when defendant was to be paid, whether weekly or monthly: See, also, *Ackley v. Mining Co.*, 112 Cal. 42, 44 Pac. 330.

If it be said that section 2011 of the Civil Code supplies by presumption the fact as to time of payment, the answer is that we are not permitted to add any fact to the findings by presumption, nor can we presume that there was "the absence of any agreement" as to when appellant was to be paid, which fact is the basis for resorting to the presumption as to when the wages were due. Besides, as was said in 110 Cal. 627, 43 Pac. 14, it was incumbent upon the appellant to bring himself within the terms of the statute, "and to show that the wages earned by him were 'due weekly or monthly.'" The owners of the property do not appeal, and no objection is made to the decree by any of the parties adjudging appellant entitled to a lien. The court made his lien subordinate to that of plaintiffs, in which there was no error. It is therefore recommended that the judgment be affirmed.

We concur: Haynes, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

BOARD OF SUPERVISORS OF CITY AND COUNTY OF
SAN FRANCISCO v. SUPERIOR COURT.

S. F. No. 1131; September 17, 1897.

50 Pac. 432.

Certiorari.—Errors in Proceedings, not Involving Excess of jurisdiction, cannot be reviewed by certiorari.

Petition for certiorari by the board of supervisors of the city and county of San Francisco against the superior court. Writ denied.

G. W. McEnerney and E. S. Pillsbury for petitioner.

PER CURIAM.—Petition for certiorari to review the judgment of the superior court removing the board of supervisors of the city and county of San Francisco from office in a proceeding under the provisions of the act of March 7, 1881 (Stats. 1881, p. 54). The writ must be denied. The facts alleged disclose no excess of jurisdiction; and error in the proceedings, not involving excess of jurisdiction, if there was such error, cannot be reviewed by certiorari.

GERKE v. CAMERON et al.

S. F. No. 785; September 15, 1897.

50 Pac. 434.

Deeds—Delivery—Presumption.—Proof That the Consideration for a deed was not paid is not alone sufficient to rebut the presumption under Civil Code, section 1065, that a grant duly executed is delivered at its date.

Partition—Validity of Sale—Estoppel.—After a Sale in Partition of devised land, the bidder refused to pay his bid, whereupon, as agreed between plaintiff devisee and the other devisees, a deed was executed by the referee to said bidder, who conveyed the property to plaintiff and certain devisees, accepting the same in lieu of money from the estate, and devisees who received no part of the land were paid so much more money. Held, that plaintiff was estopped to impeach the transactions on the ground that the referee had no authority to make the deed without the receipt of the amount of the bid.

Partition—Attack on Referee's Deed in Subsequent Partition.—And where plaintiff thereafter obtained conveyances from all the devisees except defendant, without any additional consideration, the referee's deed, if invalid, could not be assailed on a subsequent partition suit by plaintiff, unless she tendered to defendant the money which he would have received from the estate, and in lieu of which he had accepted an additional interest in said land.

APPEAL from Superior Court, City and County of San Francisco; D. J. Murphy, Judge.

Action by Nellie W. Gerke against James H. Cameron and others. From the judgment defendant George T. Cameron appeals. Reversed.

Blake & Harrison and Blake, Williams & Harrison for appellant; Freeman & Bates for respondent.

SEARLS, C.—This action was brought for the partition of a lot of land in the city and county of San Francisco. Plaintiff prays that she be decreed to be the owner of the undivided three-fourths of said property, and each of the defendants James H. Cameron and George T. Cameron to be the owner of an undivided one-eighth thereof; that certain conveyances to and by one A. Steinberger be disregarded and held for naught; that the property be sold at public auction; that from the proceeds a note and mortgage on the property to the Humboldt Savings and Loan Society, a mortgage in favor of one Kuss, and a claim of Montague & Co., be paid and satisfied, etc.; and that the residue of the proceeds be divided between the parties in the proportions of their several interests. The court found in favor of the ownership by plaintiff of three-fourths of the property, and that, during the pendency of the action, plaintiff had purchased all the interest of the defendant James H. Cameron in the property, and decreed her to be the owner of seven-eighths of the property, and defendant George T. Cameron to be the owner of an undivided one-eighth thereof. The property was ordered to be sold by a referee agreed upon, and the proceeds to be divided in the foregoing proportions. The question of an accounting was reserved for the final decree. The defendant George T. Cameron appeals from an order denying his motion for a new trial. The cause comes up on a statement of the proceedings had at the trial.

Certain facts are admitted by the pleadings, or are established without material contradiction by the evidence. Among these, and as essential to a correct understanding of the questions involved, are the following: Henry Gerke died testate on the twenty-second day of April, 1882, being seised of the property here in dispute, and certain personal property and securities, of the aggregate value of, say, \$26,191.24. This property was devised and bequeathed as follows: To each of his three surviving daughters, the plaintiff, Nellie W. Gerke, Carrie Hamlin and Lillie H. Townley, one-fourth of said estate, and to James H. Cameron and George T. Cameron, sons of a deceased daughter, the remaining fourth, or one-eighth to each. J. S. Cameron was the duly appointed and qualified executor of the last will of said Henry Gerke, deceased, and, as said executor, reduced the estate, except the property here in dispute, and some lots in Butte county, of little value, to cash. Pursuant to an arrangement among all the parties

interested, and that it might be sold and turned into money, to divide the estate, a partial decree of distribution was had on the 28th of March, 1885, whereby the property here in question was distributed, one-fourth to each of the three sisters aforesaid, and one-eighth to each of the Cameron devisees. An action in partition was brought August 11, 1885, by the plaintiff herein, in which she claimed to own three-fourths of the lot here in dispute, and that the Cameron devisees owned each one-eighth part thereof. Plaintiff averred that Lillie H. Townley and Carrie Hamlin had conveyed their interests to her. Said Lillie H. Townley and Carrie Hamlin intervened in the action, and set out that their conveyances to the plaintiff herein were in trust for them, and made solely to expedite the sale of said premises, and the settlement of the estate of Henry Gerke, deceased. The plaintiff herein answered the complaints in intervention, and admitted that she held the one-half aforesaid in trust for the interveners. An interlocutory decree was entered in said cause March 25, 1887, in which it was decreed that plaintiff herein owned three-fourths of the premises, and the Camerons one-fourth thereof, and ordering a sale thereof, the proceeds to be paid into court. The decree recites that "the said parties having stipulated in writing as to the disposition of the proceeds of such sale by the order of the court, according to the terms of said stipulation." A referee was appointed to make a sale of the property, who on July 18, 1887, filed his report, showing a sale thereof to A. Steinberger for \$11,000; and on September 21, 1887, the court made an order confirming the sale, and "directing the referee to execute a deed to said Steinberger upon payment by him of the purchase price." Steinberger had deposited a check for ten per cent of the purchase price, but afterward objected to the title, and never paid the residue of the purchase money, and his check for the ten per cent deposit was returned to him. Here we reach the first and only material conflict in the testimony.

The theory of the appellant is that, for the purpose of settling up and dividing the estate, it was agreed, and that plaintiff agreed, to take a conveyance of four-tenths of the property in dispute for \$4,603.56, in lieu of cash, and that the appellant and his brother, James H. Cameron, agreed to take a conveyance of three-tenths thereof, each, in lieu of \$3,274.28 in cash to each, and in full for their interests in the

estate; that Carrie Hamlin and Lillie H. Townley agreed thereto, and thereupon the referee conveyed the property to Steinberger for the averred consideration of \$11,000, and he in return conveyed the property to plaintiff herein, and to the appellant and his brother, by a deed of conveyance, in the proportion of four-tenths to the former and three-tenths to each of the latter; that the residue of the estate, which was then in cash, except the lots in Butte county, was divided, Carrie Hamlin and Lillie H. Townley receiving \$6,548.56 each in cash, the plaintiff herein \$1,945 in cash, and her interest in the land herein in dispute, at \$4,603.56, thus equaling \$6,548.56, and the defendant and his brother three-tenths each of the land in dispute, at \$3,274.28 each, which equaled, when united, \$6,548.56, or one-fourth of the estate to which they were entitled between them; and that the estate was thus divided. Respondent, on the other hand, and the court below found as facts: (1) That plaintiff never recognized or agreed to the sale of the property in dispute to A. Steinberger. (2) That no agreement was made by plaintiff and Lillie H. Townley and Carrie Hamlin, or either of them, that the referee, Chesley K. Bonestell, should convey the property described in the complaint to A. Steinberger, and that the latter should reconvey the same to the plaintiff and the defendants James H. Cameron and George T. Cameron in payment of sums due them from the executor of the estate of Henry Gerke, deceased, or from the said estate. The court also found that certain allegations of the complaint were true, among which was one to the effect that the deed to A. Steinberger of the lot in question was never delivered. These findings are assailed by appellant as being contrary to the evidence, and as being unsupported by the evidence. After a patient review of the testimony, we are of opinion the findings in question are unsupported by the testimony, and should not be permitted to stand.

1. The deed from C. K. Bonestell, sole referee, to A. Steinberger, which is dated April 2, 1888, and acknowledged April 3, 1888, and duly recorded May 2, 1888, recites a consideration of \$11,000, purports to convey the property described in the complaint under and pursuant to the interlocutory decree in the former action of partition, is regular in form and duly executed. It was presented by defendant George T. Cameron, and admitted in evidence without objection. Under section

1055 of the Civil Code, it "is presumed to have been delivered at its date": *Ward v. Dougherty*, 75 Cal. 240, 7 Am. St. Rep. 151, 17 Pac. 193; *Treadwell v. Reynolds*, 47 Cal. 171; *Gordon v. City of San Diego*, 108 Cal. 268, 41 Pac. 301. The presumption of delivery is not rebutted. The only other evidence on the subject is that of J. S. Cameron, the executor of the will, and that of the plaintiff. The former only mentioned the deed in a general way, by saying, in speaking of the distribution of the estate, "depending upon this exchange of deeds of the real estate as a valid transaction." Plaintiff, who was called as a witness on behalf of defendant, when questioned on the subject, said: "I don't know whether or not Mr. Bonestell, the referee in that action, ever delivered the deed to Mr. Steinberger. I never understood the sale was consummated. What I mean by that is this: He did not actually pay the \$11,000. I have no other ground for believing that the deed was not delivered. I knew at the time the deed was made to Mr. Steinberger, and the deed back was made by him, that his deed conveyed to me four-tenths of the property." On cross-examination by her own counsel she said the sale to Steinberger was not consummated, to her knowledge, that the amount of the bid was not paid by Steinberger, and that the check which he gave as a deposit on the sale was not cashed, but was returned to him. When again examined in chief she said: "When I say that this sale wasn't consummated, I mean that Mr. Steinberger didn't pay the \$11,000. That is all I mean by that." This testimony failed to rebut the presumption of delivery of the deed.

2. Did the plaintiff and her colegatees all agree to the conveyance of the property to Steinberger, and his conveyance to the plaintiff and the two defendants, Cameron, in the proportion of four-tenths to the former and three-tenths to each of the latter, and did they settle the estate on that basis, receiving the property in lieu of cash, estimating its value at \$11,000? That a deed from Steinberger to plaintiff and the two Camerons, executed on the day after the deed from the referee to the former, viz., April 3, 1888, and duly acknowledged and recorded, was delivered to the grantees therein named, conveying four-tenths of the property to plaintiff and three-tenths thereof to each of the Camerons, is admitted by the complaint and verified by the evidence. Dr. Cameron, the executor, testifies that the estate was settled up; that, as executor, he paid Lillie H. Townley and Carrie Hamlin

\$6,548.56 each in cash (one-quarter of the estate to each); to the plaintiff herein, \$1,945 in cash and \$4,603.56 in real estate, which, as will be seen, aggregates \$6,548.56; and to James H. and George T. Cameron, \$3,274.28 each in real estate, aggregating \$6,548.56, or one-fourth of the estate—and that such settlement was made on the basis of these conveyances. The plaintiff, as a witness, it is true, says the sale to Steinberger was never carried out, but, when pressed for a reason, says the \$11,000 was never paid by him; that she was not satisfied with the settlement, and, when asked why, replied that it was because more money was not coming, and gave as a cause that investments had not materialized, etc.; in short, she insisted the whole thing was void because the \$11,000 was not paid. She testified further as to the \$4,603.56 received by her in land as follows: "This latter sum was not paid to me in money. The deed under which I was to take four-tenths of the property was made in payment of that \$4,603.56 at that time, and was, as a matter of fact, accepted by me in such payment." And again: "So far as the real property in San Francisco is concerned, I was to take four-tenths of it, with other things; and at that time I had a perfect understanding of the division of this property into tenths, and had no objection to that part of it." Again, speaking of the settlement, she says: "The deed conveying four-tenths of this property to me and three-tenths to each of the defendants was made pursuant to, and as a part of, that settlement. The \$4,603.56 specified in the receipt [hereinafter set out] was paid by the four-tenths of the property. I suppose I understood it so at the time I signed the paper." The paper referred to is one without date, but was executed, as plaintiff says, at a meeting at the office of her attorney, at which she was present, at or about the date of the deeds. Defendants were represented by their guardian, and Carrie Hamlin and Lillie H. Townley by their attorney in fact, James W. Oates, who was shown to hold general powers of attorney from each of them. It is as follows:

"In the Superior Court in and for Tehama County, State of California.

"In the Matter of the Estate of HENRY GERKE, Deceased.

"Whereas, in the course of administration in the above-entitled estate and matter, the executor has paid out to the devisees under the will therein certain sums of money on ac-

count of their distributive shares of said estate; and whereas, for the purpose of reducing to money, by sale, the property situated in the city and county of San Francisco, and inventoried as a part of said estate, the devisees, Carrie Hamlin and Lillie H. Townley, conveyed their interest herein to Nellie W. Gerke and James H. Cameron and George T. Cameron, also devisees under the will, in trust, however, to hold said interests for the benefit of said Carrie Hamlin and Lillie H. Townley; and whereas, pursuant to said purpose, proceedings were had in the superior court of the city and county of San Francisco, state of California, for the partition and sale of said property, resulting in an order of sale; and whereas, the said property was sold for the sum of \$11,000 under said order of sale; and whereas, there remains undisposed of as residue of said estate, no property save and except certain town lots situated in Butte county, state of California, and inventoried at the sum of \$450: Now, therefore, this is to certify that the executor of said estate has paid to us on account of our respective distributive shares in said estate the sums following, to wit: To Carrie Hamlin, the sum of \$5,788.77, as shown by the executor's accounts, and the further sum of \$759.79, through the hands of her attorney, James W. Oates; to Lillie H. Townley, the sum of \$3,473.10, as shown by the executor's accounts, and the further sum of \$3,075.46 through the hands of said James W. Oates; to Nellie W. Gerke, the sum of \$1,945, as shown by the executor's account, and the further sum, by the hands of the executor, of \$4,603.56; to James H. Cameron, through the hands of the executor, the sum of \$3,274.28; to George T. Cameron through the hands of the executor, the sum of \$3,274.28. And we certify, each for himself or herself, that payment in full of all interest in said estate, held, claimed, or to be claimed by us, or either of us, has been made, except as to said lots in town of Dayton.

"CARRIE HAMLIN,

"By JAMES W. OATES,

"Her Attorney in Fact,

"LILLIE H. TOWNLEY,

"By JAMES W. OATES,

"Her Attorney in Fact,

"NELLIE W. GERKE,

"JAMES S. CAMERON,

"Guardian of the Persons and Estates of James H. Cameron
and George T. Cameron."

The evidence further shows that, after the execution of these deeds, plaintiff and appellant entered into possession of the premises, living together in the dwelling-house thereon, that appellant claimed to be the owner of three-tenths of the property, that plaintiff never objected to such claim, and that appellant never knew that his interest to the extent of three-tenths was disputed until this action was brought. It further appeared that on the 13th of December, 1892, the plaintiff and James H. Cameron mortgaged to the Humboldt Savings and Loan Society the undivided seven-tenths of the premises, which was the exact interest held by them under the Steinberger deed, but a greater interest than was then vested in them if such deed was inoperative. In other words, according to plaintiff's theory, at the date of the mortgage she owned one-quarter of the property, and James H. Cameron one-eighth thereof, making three-eighths in all.

In the face of all this evidence, it is absurd to say that the parties, or any of them, failed to assent to the distribution of the property and to the conveyances. The assent of Carrie Hamlin and Lillie H. Townley was emphasized by their receiving \$6,548.56, or one-quarter of the whole estate, each—a sum greatly in excess of that to which they would have been entitled had they still retained their one-quarter interests in the land in question. Plaintiff assented by accepting the deed to three-tenths of the land, and the residue of her one-fourth interest in cash. It is true that under the order of the court the referee was only authorized to execute the deed to Steinberger upon the payment of \$11,000, but, if all the parties in interest agreed so to do, they could receive as cash the very land which was sold. This was precisely what they did, and having received the land as so much cash, and settled the matter on that basis, they are estopped from now saying, to the detriment of those who without fault would suffer therefrom, that the sale was invalid, and that the deed was executed without authority. Again, let us suppose that the Steinberger deed was without authority and void. The sisters of the plaintiff, who each held a one-fourth interest in this land, received each her one-fourth interest in the estate in cash, upon the mistaken assumption that their coheirs would be equally compensated by receiving title to the land. Their equitable interest at least passed to the land, leaving in them only the naked legal title. In 1894 they transferred this legal title to the plaintiff, who pays no consideration therefor, and takes

with full notice of all the facts. Under such circumstances a court of equity can only do one of two things, viz., compel the plaintiff to refund to appellant his just proportion of the money paid to the other legatees, or to compel a conveyance of the legal title to appellant of the share or interest in the land which he took in good faith in lieu of cash. Instead of offering to do one or the other of these things, plaintiff, under such circumstances, comes into a court of equity (actions for partition are in the nature of equitable actions) and asks that she may be decreed to be the owner of three-fourths of the property, and that, too, without compensating appellant for the loss of one-half of that which was bequeathed to him, and which, if she succeeds, she will hold, to her benefit and his loss. We recommend that the order denying a new trial be reversed and a new trial ordered.

We concur: Haynes, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order denying a new trial is reversed and a new trial ordered.

WARD et al. v. FORKNER, County Treasurer.

S. F. No. 1054; September 27, 1897.

50 Pac. 713.

Mandamus Against County Treasurer.—A Petition to the Supreme court for a writ of mandate showed that, after the death of plaintiff's intestate, she, as administratrix, applied for and received from the county auditor warrants for salary due deceased as sheriff; that, upon presentation to the county treasurer, he refused to pay said warrants; that the judge of the superior court of the county was disqualified to act; and that no other judge in said county was qualified. Held, to be sufficient grounds for issuance of the writ to compel the treasurer to pay the warrants.

APPEAL from Superior Court, City and County of San Francisco.

Action by Ada F. Ward, individually and as administratrix of the estate of F. G. Ward, deceased, against Charles A. Forkner, county treasurer of Lassen county, for writ of mandate. Writ granted.

E. V. Spencer for petitioner; N. J. Barry for respondent.

PER CURIAM.—Plaintiffs gave notice to defendant that they would on June 7, 1897, apply to this court for a writ of mandate directed to defendant, commanding him to forthwith pay to plaintiffs certain salary alleged to be due F. G. Ward, as sheriff of Lassen county, and remaining unpaid at the time of his death, to wit, for the months of April and May, 1895. The notice and accompanying affidavit were duly served upon defendant, but he makes no appearance. It appears that, after the death of plaintiff's husband, she, as administratrix, demanded from the county auditor that he draw his warrants for the said salary, which he subsequently did; that they were duly presented to defendant for payment, but he refused and still refuses payment; that the application is originally made to this court for the reason that the judge of the superior court of said Lassen county is disqualified to act in the matter, having been of counsel for plaintiff before his election to that office; and that there is no judge in said county qualified to act. The petition presents sufficient grounds for the issuance of the writ; and it is ordered that the writ issue as prayed for.

Beatty, C. J., not participating.

WOODSIDE et al. v. TYNAN.*

Sac. No. 323; September 30, 1897.

50 Pac. 424.

Appeal—Law of Case—Re-examination on Second Appeal.—On a second appeal the decision on a former appeal as to the law of the case will not be re-examined.

APPEAL from Superior Court, Stanislaus County; W. O. Minor, Judge.

Action by one Woodside and others against Thomas E. Tynan, on whose decease his executor, one Hewel, was substituted as defendant. From a judgment dismissing the com-

*Rehearing denied.

plaint and from an order denying a new trial plaintiffs appeal Affirmed.

L. J. Maddux for appellants; W. H. Hatton, L. W. Fulkerth and D. M. Delmas for respondent.

PER CURIAM.—Upon the former appeal in this case (Woodside v. Hewel, 109 Cal. 481, 42 Pac. 152) the judgment and order denying a new trial were reversed upon the ground that the evidence failed to justify the findings of the court. Upon the next trial, the superior court, at the close of the plaintiffs' case, granted the motion of the defendant for a nonsuit, and entered a judgment dismissing the complaint. From this judgment and an order denying a new trial the plaintiffs appeal.

The plaintiffs offered at the trial the same evidence which was given at the former trial, and, in addition thereto, certain testimony of the defendant; but the evidence presented in the record is substantially the same as that presented upon the former appeal, and under the principles declared on that appeal the court properly held that the plaintiffs had failed to establish a cause of action against the defendant. In their brief herein the appellants attempt to show that the former opinion and judgment of this court was incorrect, presenting in great part the same arguments which were presented upon that appeal; but, that decision having become the law of the case, it was properly observed by the superior court, and we are not only fully satisfied with the correctness of our former judgment, but, under well-established rules, we also are precluded from re-examining it upon this appeal. The judgment and order are affirmed.

SHAW v. SAN DIEGO WATER CO.*

L. A. No. 186; October 8, 1897.

50 Pac. 693.

Water Rates.—A City Ordinance Providing a "Family Rate" of \$3.75 per month for water furnished for a private dwelling, declaring that where water is used for certain purposes, "or for any other purpose whatever, and no compensation is herein fixed therefor, and

*For subsequent opinion, see post, p. 814.

satisfactory rates cannot be agreed upon, the meter rates shall govern," giving any water payer the right to demand a meter and to pay a meter rate on tender of a certain amount for putting in the meter, and declaring the minimum meter rate to be \$1.75 per month, does not authorize a water company, putting in a meter without the request of a consumer, to charge him a meter rate instead of a family rate, though it declares the rate per month for water "furnished to consumers through meters" to be a certain amount per 1,000 gallons, and provides that consumers paying the following monthly rates shall be entitled to use the following quantities of water: "\$1 monthly, 4,000 gallons," and so on up to \$2 per month.

Water Rates.—An Ordinance Providing a Lump Sum Per Month as rate for water furnished a private dweller, and allowing charges according to the amount used only in case the consumer asks for it, does not confiscate property, though the water company has theretofore put in meters of its own accord at its own expense.

APPEAL from Superior Court, San Diego County; J. W. McKinley, Judge.

Action by V. E. Shaw against the San Diego Water Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Works & Works and Trippett & Neale for appellant; V. E. Shaw for respondent.

HAYNES, C.—This suit was brought by the plaintiff to enjoin the water company, a corporation engaged in supplying the city of San Diego and its inhabitants with water for domestic and other purposes, from shutting off and refusing to supply the plaintiff with water. Plaintiff had judgment, and the defendant appeals therefrom. The cause was tried upon an agreed statement of facts, which is set out in a bill of exceptions. Plaintiff owns two city lots, having a frontage of 100 feet, with a dwelling thereon, in which he and his family, consisting of eight persons, reside. The house contains one bathtub and two water-closets. Ordinance No. 295 of said city, fixing the water rates for the year beginning July 1, 1895, among other things provides the rates to be charged for the following uses: Section 1 (subdivision 1): "Bathtubs in private residences, 25 cents each per month." (4) "Water-closets in private residences, 25 cents per month." (17) "Dwellings, tenement houses, flats and other apartments, the same being occupied by not more than three persons, \$1.00

per month, and for each additional person 15 cents per month." (25) "Irrigation of lawns, etc., one cent for every front foot per month." These provisions covered plaintiff's uses, and fixed for him a monthly rate of \$3.65, known as the "family rate." Rates for hotels, lodging-houses, restaurants, etc., were fixed in a similar manner. Section 2 of said ordinance provides that "any water-rate payer shall have the right to demand a meter and to pay a meter rate upon tendering the person, company or corporation furnishing the water the sum of \$7 for placing and connecting the meter with the supply pipe of such water-rate payer." The ordinance in force the preceding year contained the provision above quoted, and also permitted the water company to put in a meter "otherwise than at the consumer's request"; and while that ordinance was in force the water company put in and connected a meter with the plaintiff's supply pipe, but not at his request. During the month of July, 1895 (the first month the new ordinance was in force), plaintiff used, as shown by the said meter, 45,532 gallons of water, which quantity, at meter rates, amounted to \$11.10; and the defendant demanded of the plaintiff, for the water so used during said month, \$10.60. The plaintiff refused to pay said sum, and tendered to defendant the amount fixed by the family rate, which sum defendant refused to accept, and threatened to cut off and discontinue plaintiff's supply of water, and this suit is prosecuted to enjoin the defendant from so doing.

The only cases in which the ordinance provides for compensation according to the quantity used, thus expressly or impliedly referring to the use of meters, are the following: Water furnished to the city for flushing sewers and sprinkling streets, water for irrigating two or more acres in one tract, water furnished ships, water used by any rate payer who shall demand a meter and pay \$7 for placing it, and the cases mentioned in subdivision 31 of section 1, which is as follows: "Where water is furnished for steam engines, gas machines or works, wash-houses, Chinese or otherwise, street and sidewalk sprinkling, or for any other purpose whatever, and no compensation is herein fixed therefor, and satisfactory rates cannot be agreed upon, the meter rates shall govern. The person, company or corporation furnishing water shall be entitled to collect a minimum meter rate of \$1.75 per month while water is being furnished through such meter."

Defendant concedes that plaintiff never demanded that a meter be put in, but bases its right to charge the plaintiff at meter rates upon the following provisions of said ordinance: Subdivision 30 of section 1: "The rates for water furnished to consumers in any one month through meters are fixed as follows" (specifying a rate per 1,000 gallons, the rate diminishing as the quantity increases); and section 4, which reads as follows: "Consumers paying the following monthly rates shall be entitled to use monthly the following quantities of water: \$1 monthly, 4,000 gallons; \$1.25 monthly, 5,000 gallons; \$1.50 monthly, 6,200 gallons; \$2 monthly, 8,300 gallons."

Defendant's contention that the meter rates fixed by subdivision 30 apply to all cases where a meter has been put in, whether by the voluntary act of the water company, or upon the demand of the consumer, cannot be sustained. The ordinance fixes a family rate based upon the uses to which water is applied, and not upon the quantity used. Except in the cases specified, and which are above enumerated, the use of a meter is not made compulsory upon the consumer; but he is given the option of requiring the water company to put in a meter, and, if he does so, he must pay meter rates. The right to have water furnished at the family rate, where a meter has not been demanded, is absolute. The constitution vests the power to fix water rates in the common council, requires this power to be exercised annually, and provides that any person, company or corporation collecting water rates in any city or town otherwise than as so established shall forfeit his or its franchises and waterworks to the city or town (article 14, section 1). If the water company may of its own motion put in a meter, and charge a consumer meter rates who is entitled under the ordinance to family rates, it is obvious that it can, as to this class of consumers, change the rate at its pleasure, without his consent. This clause of subdivision 30, therefore, can only apply to those cases where the ordinance or the consumer requires the use of a meter. This is made clear by the provisions of subdivision 31, which requires that where water is used for certain purposes therein enumerated, "or for any other purpose whatever, and no compensation is herein fixed therefor, and satisfactory rates cannot be agreed upon, the meter rates shall govern." The compensation for plaintiff's use of water is distinctly provided for in the ordi-

nance, and is therefore excluded from the provisions fixing meter rates. Besides, if defendant's contention is sound, it would enable it to distinguish between consumers to whom the family rates are applicable, and apply different rates to individuals of a class from those prescribed by the ordinance for the whole of the class. Nor does section 4, hereinbefore quoted, relieve the defendant from the results to which its contention would inevitably lead. What that section means, it is not easy to determine; but it does not say that one entitled to family rates shall pay for any excess used above the quantities there stated at meter rates, or any other rate. Nor does it fix a meter rate, or, if it does, it is a rate inconsistent with the meter rates fixed by subdivision 30, which fixes the rate per 1,000 gallons, up to 10,000 gallons, at thirty cents per 1,000, while section 4 fixes the rate up to 5,000 gallons at twenty-five cents, with a slight diminution in price up to 8,300 gallons, at which amount the section ends. Not only so; it provides that a consumer paying a monthly rate of \$1 shall be entitled to 4,000 gallons, while subdivision 31 provides that the minimum meter rates shall be \$1.75 per month. Nor does it provide how the quantity shall be ascertained—whether by meter or otherwise. It cannot, therefore, affect the positive provisions of the ordinance fixing family rates by the use to which the water is applied, independently of the quantity used. This mode of determining the monthly rate cannot be reconciled with the construction given to section 4 by appellant. That the construction I have given to the ordinance may permit consumers to use a quantity of water entirely out of proportion to the rate paid is conceded, but that is the fault of the ordinance. The water company cannot, by attaching meters or otherwise, impose upon consumers rates neither authorized by the ordinance nor assented to by the consumer. Those paying family rates are entitled to all the water reasonably required for the uses specified, and the quantity used, especially upon lawns, varies from month to month. It is not necessary to determine whether the water company has any remedy where there is a wanton or negligent waste of the water; but, if there is such a remedy, it must be based upon allegations and proof of such waste, and would not appear from the simple statement that a given quantity was used.

It is alleged in defendant's answer that the number of meters put in and used by defendant at the time said ordinance was adopted was 1,616, that the cost thereof was more than \$48,000, and, if not permitted to use them for the purpose of fixing rates, they will be rendered useless, and if compelled to take them out, or retain them in place without using them, they will be practically confiscated. It is contended that when the ordinance was enacted the common council knew that these meters had been put in, and that the meter rates were fixed with the intention that plaintiff should be charged meter rates. This argument would apply to all consumers upon whose supply-pipe meters were voluntarily placed by the water company, and the allegations of the answer and the argument would imply that all the meters were so placed. If so, and loss to the company results, it is not in a situation to complain. The ordinance of the preceding year, under which the meter was placed on plaintiff's supply-pipe, certainly gave defendant no assurance that it could ever charge the plaintiff meter rates, since it provided, in the same section which made it the duty of defendant to put in a meter upon the demand of the consumer, that "if any consumer, after having a meter put in, discontinues or abandons the use thereof, he shall pay to the owner thereof \$3 for removing it." This provision shows clearly that the use of a meter as a means for fixing the rate to be paid was entirely optional with the consumer; and if it had been the intention of the common council in adopting the new ordinance, whether for the purpose of preventing loss to the water company, or for any other reason, to make so radical a change as to require all persons upon whose supply-pipes the defendant had voluntarily placed meters to pay meter rates, at the option of the company, it would be reasonable to suppose that language would have been used which would have expressed that intention, and I think it clear that no such intention appears. The judgment appealed from should be affirmed.

I concur: Chipman, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

SHAW v. SAN DIEGO WATER CO.

L. A. No. 186; November 6, 1897.

50 Pac. 1074.

In bank. For opinion in division, see ante, p. 808.

PER CURIAM.—Rehearing denied.

BEATTY, C. J.—I dissent from the order denying a rehearing of this cause, upon the grounds stated in the following opinion upon the case, originally prepared by Commissioner Searls, which I think is correct, and should have been adopted by the court.

SEARLS, C.—This is an action to restrain the San Diego Water Company (a corporation organized and existing under the laws of the state of California, and engaged in the business of supplying and selling water to the inhabitants of San Diego for domestic and other purposes) from turning off and refusing to supply the plaintiff with water for domestic purposes, and for the purpose of irrigation. Plaintiff had judgment from which defendant appeals.

The cause was submitted to the court upon an agreed statement of facts, from which it appears that plaintiff has a residence in the city of San Diego, and two city lots, aggregating one hundred feet front, upon which he resides. He has obtained water for domestic purposes and irrigation of said lots from defendant. In 1894 defendant, on its own motion, and without the request of plaintiff, under an ordinance of the city of San Diego establishing water rates for the year ending June 30, 1895, placed a meter in the pipe conducting water to the premises of plaintiff, and the whole question involved in this case is this: Had defendant a right to demand and collect from plaintiff for the month of July, 1895, meter rates, which would entitle it to collect \$10.10, and which plaintiff refused to pay, or family rates, which entitled defendant to \$3.65, and which sum plaintiff tendered to defendant, and the latter refused to receive? In the month of February, 1894, and again in February, 1895, the city council of San Diego, in accordance with the requirements

of section 1 of article 14 of the constitution, adopted ordinances, to take effect on the 1st of July next ensuing, regulating the rates and compensation to be collected by any person or corporation supplying water for domestic use and private purposes to the inhabitants of that city during the years commencing July 1, 1894, and July 1, 1895, respectively. The ordinance of 1894 fixed the price to be charged per 1,000 gallons for meter rates, required the water company to furnish meters upon demand of consumers, and payment by the latter of \$7, and also provided that "if a meter is placed and used as a meter otherwise than at the consumer's request, said person, company or corporation shall be entitled to collect a minimum sum of \$1.50 per month for water. These provisions shall apply to meters set either heretofore or hereafter." Where the meter was placed at the consumer's request, \$2 per month was the minimum charge. It was while this ordinance was in force that defendant, on its own motion, placed the meter on plaintiff's supply-pipe. The ordinance of 1895 fixes specific rates per month for the use of water for a great variety of purposes, including bathtubs, water-closets, barber-shops, etc. Subdivision 17 of section 1, under the head of "Families," is as follows: "Dwellings, tenement houses, flats and other apartments, the same being occupied by not more than three persons, one dollar per month, and for each additional person fifteen cents per month." The twenty-fifth subdivision of the same section is as follows: "Irrigation of lawns, etc., one cent for every front foot per month." Subdivision 30 of the same section is as follows: "Meter Rates. (30) The rates for water furnished to consumers in any one month through meters are fixed as follows: Twenty-two and one-half cents per 100 cubic feet, or 30 cents per 1,000 gallons, provided the amount used shall not exceed $1,333\frac{1}{3}$ cubic feet or 10,000 gallons per month; $18\frac{3}{4}$ cents per 100 cubic feet, or 25 cents per 1,000 gallons for each 1,000 gallons over 10,000 and not exceeding 30,000 gallons; 15 cents per 100 cubic feet or 20 cents per 1,000 gallons for each 1,000 gallons over 30,000 gallons and not exceeding 100,000 gallons; $11\frac{1}{4}$ cents per 100 cubic feet or 15 cents per 1,000 gallons for each 1,000 gallons over 100,000 gallons. (31) Where water is furnished for steam engines, gas machines or works, wash-houses, Chinese or otherwise, street and sidewalk sprinkling, or for any other

purpose whatever, and no compensation is herein fixed therefor, and satisfactory rates cannot be agreed upon, the meter rates shall govern." Section 2 provides, as did the ordinance of 1894, for meters to be furnished on demand of rate payers and on like terms, but does not provide that meters shall be placed, except on demand of consumers. Section 4 is as follows: "Sec. 4. Consumers paying the following monthly rates shall be entitled to use monthly the following quantities of water: \$1 monthly, 4,000 gallons; \$1.25 monthly, 5,000 gallons; \$1.50 monthly, 6,200 gallons; \$2 monthly, 8,300 gallons." The ordinance provides fixed and specific rates per 1,000 gallons for water used for flushing sewers, for sprinkling purposes, for irrigating tracts of land of two or more acres, to shipping in the harbor, to water-supply boats, and for hydraulic elevators and motors in hotels and stores. The agreed statement shows that during the month of July, 1895, plaintiff received from defendant, and used upon his premises, 45,532 gallons of water, measured through a meter.

The contention of appellant may be summarized thus: (a) The ordinance of 1894 authorized defendant, on its own motion, to place meters upon its own supply-pipes of its customers, the consumers of water, and in December of that year it lawfully placed a meter upon plaintiff's supply-pipe. (b) Under paragraph 30 of section 1 of the ordinance of 1895, which provides that "the rates for water furnished to consumers in any one month through meters are fixed as follows," etc., and hence, as defendant furnished water to plaintiff through a meter, it was entitled to charge the meter rate fixed by the ordinance. We think this contention cannot be sustained. Section 2 of the ordinance provides that any water-rate payer shall have the right to demand a meter, and to pay a meter rate, upon tendering \$7 for placing the meter, etc. It is for consumers who of their own volition have called for meters, and for the other cases provided for in the ordinance where meter rates are to be charged, that this section must be presumed to have been adopted, and not generally to the mass of consumers. The ordinance fixes specific rates to be paid for water to be used for nearly forty different purposes. The theory advanced by appellant would render all these provisions nugatory. When, therefore, the ordinance fixes rates to consumers who receive water through meters, it must be construed to mean such consumers as have elected

to have meters, and to receive water through the same, and to such cases as under the ordinance pay, not a specific rate, but a meter rate.

We have found it somewhat difficult to harmonize the various portions of the ordinance of 1895 so as to give force and effect to all of its provisions. The conclusions we reach after a careful study of its various parts may be summarized, so far as applicable to this case, as follows: (1) Where the ordinance prescribes a fixed rate for a given service, that rate, in the absence of some agreement to the contrary, must prevail, and cannot be varied at the option of the parties. (2) Where water is furnished for any purpose whatever, and no compensation is fixed by the ordinance, or by agreement, then, under the thirty-first paragraph of section 1 of the ordinance, the meter rates will govern. (3) The ordinance has a fixed specific rate for the uses to which plaintiff applies the water by him received from defendant, but by section 4 of the ordinance the quantity to be used by a consumer is limited in quantity, monthly, as follows, viz.: Those paying \$1, to 4,000 gallons; those paying \$1.25, to 5,000 gallons; those paying \$1.50, to 6,200 gallons; those paying \$2, to 8,300 gallons. The justice of limiting to a given quantity of water the consumer who pays a given price is apparent. Were it otherwise, fixing a given price to a consumer, for, say, family use, would be a license to him to waste as much water as he saw fit. This would be rank injustice; hence the provision of the ordinance. The ordinance fails to prescribe any quantity of water to which consumers shall be limited who pay a sum in excess of \$2 per month. It was probably supposed that this would cover all the cases in which meter rates were not provided. We cannot suppose that it was the intention of the lawmakers to limit a consumer who pays \$2 per month to the use of 8,300 gallons of water, and to permit one who pays \$3.65 per month to consume water ad libitum. Family rates are fixed by the ordinance at a given price per month, but this limitation is to be taken in connection with the quantity of water which, on payment of the price, the consumers are entitled to use, as provided in section 4. In other words, they are entitled to a given quantity of water for a given sum of money. When the quantity consumed is in excess of the quantity

specified in section 4 of the ordinance, there is no specific price fixed, except by paragraph 31 of section 1, which, after enumerating certain uses, adds, "or for any other purpose whatever, and no compensation is herein fixed therefor, and satisfactory rates cannot be agreed upon, the meter rates shall govern." To illustrate: A consumer who pays a monthly rate of \$1 per month is entitled to use monthly 4,000 gallons of water. To determine this quantity a meter is essential, and for that purpose may manifestly be inserted. When the 4,000 gallon limit is reached, one of two things must occur—either the defendant can cut off the further supply for the month, or, if it continues the supply, it is entitled to payment therefor, under the clause of the ordinance above quoted, at meter rates, upon the ground that the compensation therefor is not fixed by the ordinance. That this last course is contemplated by the ordinance we think clear. In no other way can effect be given to section 4, which limits the quantity of water to be used for a given price. The family rate fixed by the ordinance regulates the sum to be paid up to the limit of quantity fixed by section 4. When the consumer reaches that limit as to quantity, he has received all that he has paid for; and, if he consumes additional water, it is but just that he should pay for it in the manner provided in such case by the ordinance. It is true, section 4 of the ordinance does not specify the quantity of water to which specific rate payers are entitled whose rate is in excess of \$2. But we can hardly suppose that the local legislature intended to confine the consumer who pays \$2 to 8,300 gallons per month, and at the same time to permit the consumer who pays an additional fifteen cents to consume 1,000,000 gallons, or other indefinite quantity. The question presents difficulties, and, the ordinance being obscure, we may properly consider the circumstances existing, and the state of the local law in force, at the date of its adoption, as aids in its interpretation. Turning to the ordinance of 1894, and we find that section 4 of that ordinance is as follows: "Sec. 4. Nothing herein contained shall be construed as requiring or permitting the person, company or corporation to charge or collect meter rates in any case where he or it shall, at his or its own cost, apply, either before or after the passage of this ordinance, a waste detector, except as hereinafter provided. Within the meaning of this ordinance a waste de-

detector is a meter applied for the purpose of detecting waste. Wherever any waste detector shows that any consumer, during any month, is using a quantity of water which at meter rates exceeds his house and irrigation rate, said person, company or corporation may collect for such excess at meter rates, but shall not impose meter rates, with this exception, unless in cases permitted by this ordinance." A waste detector is but a meter, and it will be observed from the latter clause of the section that, in effect, it authorized charging the consumer for all the water used by him at meter rates, and, when the charge therefor exceeded his house and irrigation rate, he was to be charged with the excess. In other words, the last clause of the section completely annulled the prior clause in the same section, and, in effect, entitled the defendant to charge meter rates where it had, on its own motion, placed meters on its supply pipes, as well as where demanded by consumers. That ordinance, like the one of 1895, contained a meter rate. We may well suppose that the object of adopting an ordinance in most respects precisely like that of 1894, but with section 4 entirely different, was to preclude charging meter rates to consumers with fixed rates, and at the same time to guard against waste and excess in the user by those who pay a fixed sum per month. The ordinance of 1894 guarded against such waste and excess by charging a meter rate on all the water used. The ordinance of 1895 attains the same end by limiting the quantity to which the consumer is entitled at a given price. Under section 4, plaintiff, by parity of reasoning, should be entitled to the use of water in proportion to the sum he pays in the ratio established by the section. This would entitle him to a quantity approximating 15,000 gallons per month in return for his rate of \$3.65. For the residue of the water consumed by him in July, 1895, he should stand charged with general meter rates, not simply because defendant has attached a meter to his supply-pipe, but because the ordinance of 1895 having failed to fix the compensation therefor, he is, under paragraph 31 of section 1 of such ordinance, chargeable with meter rates. It follows that the judgment should be reversed and the cause remanded.

I concur: Belcher, C.

BOURN v. DOWDELL et al

S. F. No. 525; October 7, 1897.

50 Pac. 695.

Pleading.—An Admission in Plaintiff's Answer that pledged property was sold after a certain date cures a cross-complaint defective in not so stating.

Guaranty.—A Contract Provided "That B. Should have the Privilege at any time hereafter of selling the wine belonging to or hypothecated by D., at a price not less than thirteen cents per gallon." A subsequent clause provided that "the wine may be sold by B. at any price after March 1, 1893, provided B. guarantees a profit to D. of \$4,000." Held, that B. might sell before said date at not less than thirteen cents per gallon, and after said date at any price, upon guaranty of \$4,000 profit to D.

Contracts—Second Superseding First.—Defendants, Being Indebted to plaintiff, executed their note to him for the amount, and pledged 520,000 gallons of wine to secure payment. A contract between the parties, made two days later, contained provisions inconsistent with the prior agreement. It provided for a division of profits of defendants' business between the parties, on a basis different from that contained in the first agreement. The wine was by it again delivered to plaintiff; and it fixed the conditions on which the wine might be sold by plaintiff, and the time of sale, and the price to be received, and entered into details of past, present and future dealings, and the manner in which they were to be carried out. Held, that the second agreement superseded the first.

Guaranty.—Where Wine was Pledged With Power in the Pledgee to sell upon guaranty to the pledgors of a profit for them of \$4,000, the guaranty was supported by a sufficient consideration.

Guaranty.—The Guaranty was Absolute, and not upon condition that the pledgee should be fully paid.

Guaranty.—Breach of the Guaranty was not a Mere Offset pro tanto to a note secured by the pledge, but was a complete defense.

APPEAL from Superior Court, Napa County; E. D. Ham, Judge.

Action by William B. Bourn against James Dowdell and Arthur B. C. Dowdell. From a judgment for defendants and an order denying a new trial plaintiff appeals. Affirmed.

Page & Eells for appellant; F. E. Johnson and Rodgers & Paterson for respondents.

GAROUTTE, J.—This action was brought on a promissory note calling for the payment of \$36,000. Prior payments had been made thereon; but the amount of these payments is not material. Defendants, by way of cross-complaint, set out certain agreements, claiming thereby full satisfaction of the note, and also a judgment against plaintiff in the sum of \$4,000. The views of the trial court coincided with defendants' claims, and, as a result, judgment went against plaintiff for that amount. An appeal is prosecuted from the judgment and order denying the motion for a new trial. The questions involved in this case are purely matters of fact, and largely dependent upon the construction to be given three certain agreements entered into in writing by plaintiff and defendants. The findings of fact made by the trial court have support in the evidence, and will be taken as true in the consideration of the questions here presented.

Defendants were lessees of plaintiff's wine cellar, and, upon a settlement between the parties, it was found that they owed plaintiff for cash advances, rental, etc., \$36,077. At this time, November 26, 1892, defendants gave plaintiff their promissory note for that amount and such note is the one here sued upon. Contemporaneous with the execution of the note, a collateral agreement was entered into by the parties, whereby defendants pledged 520,000 gallons of wine, then in defendants' cellar, to secure the payment of the aforesaid note. Previous to this time, to wit, September 21, 1892, these same parties had entered into another written agreement appertaining to the advances to be made by plaintiff, and the purchase of grapes and the manufacture of wine and brandy by defendants. This agreement, among other things, provided that, in addition to a certain rate of interest to be paid by defendants upon advances made, plaintiff was to have the option of an additional two per cent per annum, or one-third of the net profits of the venture. This agreement further declared in detail how these profits were to be determined. Upon November 28th, two days after the making of the second agreement and the promissory note, defendants desiring still further advances, to be used in carrying on the business of the manufacture of wine and brandy, the parties entered into a third agreement in writing. By this agreement plaintiff promised to make additional advances to defendants, not to exceed \$35,000; and, among other matters, we find the follow-

ing recitals and covenants set forth in that agreement: "Whereas, certain contracts and agreements were heretofore made and entered into between the same parties, said contracts and agreements bearing date September 20, 1892, and September 21, 1892; and whereas, under said contracts, the sum of \$36,077.08 was determined and found due W. B. Bourn on the 21st of November, 1892, exclusive of his share of profits; and whereas, said sum was paid Bourn by Dowdell and Son by a certain promissory note dated November 21, 1892, payable on or before March 21, 1893, and secured by about 520,000 gallons of wine; and whereas, Dowdell and Son are desirous of obtaining additional sums of money from Bourn to be used in the viticultural operations, as expressed in the agreement dated September 21, 1892: Now, therefore, in consideration of the covenants herein contained, it is mutually agreed that any and all profits that may arise or accrue from the viticultural operations of Dowdell and Son shall be divided as follows: \$4,000 is hereby determined as Dowdell and Son's share before said Bourn shall be entitled to any profit. After Dowdell and Son have received or derived profits to said amount of \$4,000, Bourn shall have and receive as his share of the profits all sums up to but not exceeding the sum of \$6,500. . . . All profits shall be estimated as determined and expressed in the agreement dated September 21, 1892. . . . It is mutually agreed that W. B. Bourn shall have the privilege at any time hereafter of selling all the wine belonging to or hypothecated by Dowdell and Son, at a price not less than thirteen cents per gallon, at St. Helena; . . . but, before he shall make any sales, he shall notify Dowdell and Son in writing of his intention to do so. . . . For the security of all moneys owing or that may become owing to Bourn, or for future advances, Dowdell and Son have executed and delivered the notes herein mentioned; and, as security for all the sums due or to become due by virtue of this or any agreement, Dowdell and Son hereby deliver to W. B. Bourn all wines made at Graystone during the vintage of 1892, being about 520,000. . . . It is mutually agreed that the wine and brandy may be sold by Bourn at any price after March 1, 1893, provided Bourn guarantees a profit to Dowdell and Son of \$4,000; and, if the wine and brandy is not sold, all agreements in reference to settlement will be made

as per the terms of the original agreement, dated September 21, 1892."

The trial court found as a fact that Bourn sold the wine after March 1, 1893, and thereupon held defendants entitled to the \$4,000 provided for by the guaranty of Bourn. The point is now made that the cross-complaint has no allegation that this wine was sold after March 1, 1893, and also no allegation that it was sold at a price less than thirteen cents per gallon, and that such allegations were necessary to the statement of a cause of action. But, by an allegation in the answer to the cross-complaint, we find an admission of plaintiff that he sold the wine after March 1, 1893; and this admission is equivalent to an allegation in the cross-complaint to that effect, and the objection therefore is without force. Neither do we think there is strength in the remaining position taken. As we construe the two clauses of the agreement bearing upon the sale of the wine by Bourn, the second is a limitation upon the first; that is to say, Bourn was authorized to sell the wine before March 1, 1893, at a price not less than thirteen cents per gallon, and was also authorized to sell the wine after March 1, 1893, at any price, guaranteeing to defendants a profit of \$4,000.

Probably the most important question presented at the trial related to the respective times when the second and third agreements were made and executed. It was claimed by appellant that these two agreements were made at the same time, and were part of one and the same transaction. This claim was controverted by respondents, and the court found against appellant's contention. The finding of fact bearing upon this question will not be disturbed by us. As to the respective dates when these two agreements were made, the matter is immaterial. The all-important question was and is, Should these two agreements be considered and coupled together as one single agreement? A variance between the dates set forth in the pleadings and the dates found by the court as to the respective times when they were made amounts to nothing. A period of time intervening between the making of these two agreements was the controlling question, and this intervening period was just as controlling when laid at one time as at another.

The third agreement between these parties is not well drawn, and is of most obscure meaning. At the same time,

it is quite apparent that it was intended by its terms to supersede the second agreement made. Many of its provisions indicate such intention. Many of its provisions are absolutely inconsistent with the terms of the agreement made at the time the \$36,000 note was delivered. Indeed, the third agreement appears to have been intended to cover all the transactions of the parties. It provides for a division of the profits of the viticultural operations of defendants. This provision clearly takes the place of a provision found in the first agreement bearing upon the matter of profits. The 520,000 gallons of wine with which the second agreement dealt is again delivered to Bourn as security for all sums then owing or to become owing. The agreement fixes a price at which this wine may be sold. It fixes certain times and conditions bearing upon the sale; and it enters into minute details as to the business transactions—past, present and future—between these parties, and the manner in which they are to be carried out to final termination. The trial court's construction of this contract we deem the correct one.

It is claimed: (1) That the guaranty of profits to defendants is unsupported by a consideration; (2) that the guaranty is upon the implied condition that all plaintiff's advances shall be repaid; (3) that, in any event, the guaranty is not a complete defense to the note sued on, but only an offset pro tanto. We deem it unnecessary to address ourselves to a further consideration of the meaning of this contract. It is sufficient to say that these contentions of appellant are untenable. The contract bears no such construction. For the foregoing reasons the judgment and order are affirmed.

We concur: Harrison, J.; Van Fleet, J.

PEOPLE v. BENNETT.

Cr. No. 261; October 8, 1897.

50 Pac. 703.

Criminal Law—Second Appeal.—Under a Charge of Assault with intent to commit murder, defendant was convicted of the lesser offense of assault with a deadly weapon, and a new trial was granted him, for insufficient evidence. On a second trial he was convicted of the higher offense, and on his motion a new trial was granted on the

sole ground that he had been twice put in jeopardy for the same offense. On appeal by the people the judgment was reversed because he did not plead former jeopardy. The trial court, on return of remittitur, pronounced judgment on the verdict. Held, that the supreme court could not, on appeal by defendant from such judgment, review its former decision.

Criminal Law.—Where the Record on Appeal Discloses Sufficient Evidence to uphold a conviction, the judgment will not be disturbed.

APPEAL from Superior Court, Alameda County; F. B. Ogden, Judge.

C. R. Bennett was convicted of assault with intent to murder, and appeals from the judgment. Affirmed.

D. M. Connor for appellant; Attorney General Fitzgerald for the people.

PER CURIAM.—This is an appeal from the judgment rendered upon the verdict of a jury finding defendant guilty of assault with intent to commit murder. In January, 1895, the appellant, Bennett, was placed on trial before the superior court of Alameda county under an information charging him with an assault with intent to commit murder. The jury found the defendant guilty of the lesser offense of assault with a deadly weapon. He moved for a new trial upon the ground that the verdict was not supported by the evidence, and his motion was granted. In May, 1895, he was again put on trial, under the same information, before the same court and the same judge. A jury was impaneled and sworn to try the case, and without any other or further arraignment of appellant, or any new or other plea, the trial proceeded to its close, and the jury found Bennett guilty of assault with intent to commit murder. He again moved for a new trial, which was granted upon the sole ground that he had been twice put in jeopardy for the same offense. From this order the people appealed. The opinion and judgment of this court reversing the order granting defendant a new trial will be found reported in the one hundred and fourteenth volume of our reports, at page 56 (45 Pac. 1013.) By this decision it was declared that in a criminal case, tried, as this one was, under the same information and before the same court, the fact that the defendant had been acquitted of the graver charge of assault with intent to commit murder by the verdict

of the jury upon the first trial, finding him guilty of assault with a deadly weapon, could not be availed of by defendant after trial, except under an express plea of once in jeopardy. interposed by him before the trial. For this reason the order of the trial court was reversed. Upon the return of the remittitur the trial court, as was its duty to do, pronounced judgment upon defendant under the verdict of guilty of assault with intent to commit murder, and sentenced him to imprisonment in the state prison. From that judgment he prosecutes this appeal, and his counsel insists that this court erred in its former determination, in reversing the order granting him a new trial, and asks us to reconsider the question upon this appeal. But this we cannot do. All of the considerations which govern the application of the doctrine of the law of the case are present here with peculiar and exceptional force. The precise point in controversy was, in a former appeal in this same cause, decided by the court, and its decision has become final. The action of the trial judge in pronouncing sentence upon the defendant for the crime of assault with intent to commit murder was an action in which he had no discretion, but which he was commanded to perform by the judgment of the court. He could have done no other than he did without disregard of his oath. The former decision thus became the rule of law governing the rights of the parties, and the conduct of the trial judge in the determination of this question, and we have no lawful power to review our own judgments which have become final at the expiration of the constitutional period of thirty days. The subversion of the wise and long-settled rule that a previous decision of this court is conclusive in the same case upon the rights of the parties, and is not the subject of revision, would lead to such disastrous results that it may not for a moment be contemplated: *Dewey v. Gray*, 2 Cal. 374; *Clary v. Hoagland*, 6 Cal. 688; *Cordier v. Schloss*, 18 Cal. 576; *Leese v. Clark*, 20 Cal. 387; *Jaffe v. Skae*, 48 Cal. 543; *Wilkinson v. Merrill*, 56 Cal. 560. Appellant's further contention that the court erred in instructing the jury in regard to the crime of assault to murder is disposed of by what has already been said. Upon the last proposition, that the evidence is insufficient to justify the verdict, we can but repeat that it is not the province of this court to substitute its own views of the

evidence for those of the jurors, and the record discloses sufficient testimony to uphold the verdict. The judgment appealed from is therefore affirmed.

BEATTY, C. J.—I concur in the judgment solely because it has passed out of the power of the court to decide the case upon its merits. In doing so, I desire to subjoin an opinion which I prepared at the time a rehearing of the former appeal was denied, setting forth my reasons for dissenting from that order.

BEATTY, C. J.—Having dissented from the order denying a rehearing of this cause by the court in bank, and being profoundly convinced that the decision given is not only erroneous, but mischievous in its consequences, I deem the matter of sufficient importance to justify a statement of the grounds of my dissent. It is not alone because the necessary result of the judgment which has thus become final is to consign this defendant to the state prison, as a felon, upon conviction of a crime of which he has once been legally acquitted, that I feel constrained to record my earnest protest against the decision of the court, but it is more especially because the practice which must henceforth obtain in similar cases in this state is at variance with elementary and fundamental principles of pleading and procedure, unsupported by any principle or authority, and in conflict with numerous express adjudications of this court, and of the highest courts of other states of the Union. Stated in its simplest form, the point here decided is that the defendant in a criminal action can under no circumstances claim the benefit of a former acquittal except by interposing a special plea of such acquittal, and submitting the issue to a jury. To sustain this proposition I feel safe in asserting that no authority can be found in any statute, decision or text-book. At least, I have been unable, after a somewhat extended search, to discover any such authority; and certainly none is to be found in the list of statutes, texts and decisions cited by Justice Garoutte in his opinion. On the contrary, I have found and shall cite numerous well-considered cases in which the contrary has been held.

Before entering upon a particular examination of the authorities, however, it will be convenient to call attention

to the sole and simple question involved in this case, which, as it seems to me, has been wholly overlooked in the opinion of the court. The question really presented by this appeal is whether a court which has awarded a new trial of one specific issue out of several issues made by the pleadings is or is not competent and obliged to confine the trial to that specific issue. As an original proposition, it would seem to be beyond dispute that a court of record and of superior jurisdiction ought to be held to know what the issue is which it has impaneled a jury to try, and that it is its duty to confine the trial to that issue. The only authority for a new trial is the order made in that very case for a new trial, and when that order is limited, either in terms or in legal effect, to one issue, it seems absurd to say that the court must shut its eyes to its own order, and open the case to a new trial upon all the issues. If this view is correct—as I shall show that it is, both upon principle and authority—it follows that there was not upon the second trial of this defendant any question of former jeopardy involved. He was only on trial for assault with a deadly weapon. The charge of assault to murder, of which he has been acquitted, was out of the case, as much as if it never had been in the indictment, and so the jury should have been instructed. To sustain this view it is not necessary to go outside of our own decisions in search of authority. The leading case in California upon this point is *People v. Gilmore*, 4 Cal. 376, 60 Am. Dec. 620. The defendant in that case had been indicted for murder, convicted of manslaughter, and, on his own motion, awarded a new trial. On his second arraignment he pleaded a former acquittal. The report of the case does not expressly state what was done with his plea, or what the verdict was on the second trial, but apparently his plea was overruled and he was convicted of murder. On his second appeal, Chief Justice Murray, delivering the opinion of the court, stated the questions to be determined in this language: "The questions presented are: (1) The prisoner having been convicted of manslaughter, can he, on a second trial, *be compelled to answer to the charge of murder?* And, (2) admitting that he cannot, whether the prisoner can again be tried for manslaughter, inasmuch as the indictment against him is for the crime of murder." I have italicized the con-

cluding words of the first question, to call attention to the fact that, in the opinion of Chief Justice Murray and the court, the question was not whether the defendant, on his third trial, should be allowed, as against the charge of murder, to interpose and prove a plea of former acquittal, but was whether he could, on the second trial, "be compelled to answer to that charge." An examination of the whole opinion, and of the authorities cited in support of the conclusions reached, will show that the language in which the questions for decision were stated was carefully and advisedly chosen and that the point decided was not that the plea of former acquittal should be accepted, and evidence allowed to go to the jury in support of it, at the new trial which was ordered, but that the new trial must be confined to the charge of manslaughter. Such in fact was the special direction accompanying the order remanding the cause to the district court. Now, if the defense of former acquittal must always be made by plea, and submitted to the jury upon evidence adduced before them, I should like to know how we are to justify our former supreme court in taking the matter away from the jury, and deciding it as a pure question of law, as was done in this case. The supreme court has before it only a transcript of the original record remaining in the court from which the appeal is prosecuted, and can by no possibility see any more in the record than the lower court can take notice of. And therefore when it can find from the record, as matter of law, that the prisoner stands acquitted of the higher offense charged in an indictment, the lower court must be held to take notice of the acquittal, and to give effect to it. The supreme court does not command the lower court to do what it cannot lawfully do, or what it ought not to do, or has not the power to do in the absence of such command.

In *People v. Gilmore* the court, speaking of the legal effect of a verdict of manslaughter upon an indictment for murder, quote and adopt the following language of the supreme court of Mississippi: "The jury, in such a case, in contemplation of law, render two verdicts—the one acquitting him of the higher crime, the other convicting him of the inferior." And this is the principle and the basis of the decision there, and in the numerous cases in which it has been followed in this and other states. And from it are deduced the effect and consequences of an order for a new trial in such cases,

viz., that such order extends only to so much of the issue as is embraced in the charge of which there was a conviction. When that case arose, section 439 of the criminal practice act was identical in terms with sections 1179 and 1180 of the Penal Code, except that it did not embrace the last clause of section 1180, commencing with the words, "or be pleaded," etc.—a clause which seems to have been added for the purpose of legislating out of existence the doctrine of *People v. Gilmore*, and the constitutional right which it maintains. Those sections of the Penal Code read as follows:

"Sec. 1179. A new trial is a re-examination of the issue in the same court, before another jury, after a verdict has been given.

"Sec. 1180. The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew, and the former verdict cannot be used or referred to either in evidence or in argument, or be pleaded in bar of any conviction which might have been had under the indictment."

The attorney general contended in the *Gilmore* case that the whole controversy was determined by the express provisions of section 439 of the criminal practice act, and possibly the same contention might be made here, upon the terms of the above-quoted sections of the Penal Code. The argument there was that, in view of the statute, the award of a new trial necessarily embraced the whole of the issues arising upon the indictment and the original plea of not guilty. But the court construed the law otherwise. They said: "It [section 439] is, however, susceptible of another meaning, and one more in consonance with the humane and enlightened spirit of the age as well as of our jurisprudence. I understand it to mean the issue in controversy, not the one that has been settled by the jury in favor of the defendant; and I understand the words, 'placing the parties in the same position that they occupied before the trial,' as simply applying with reference to the issues undisposed of." In strict accordance with these views, the judgment was reversed, and the cause remanded to the district court, with instructions "to try the prisoner for manslaughter, in accordance with this opinion."

The next case in which this question arose in this state was *People v. Backus*, 5 Cal. 275. This case, like the preceding

one, is very imperfectly reported; and it does not appear from any express statement, though it is clearly to be inferred, that the indictment was for murder, and the verdict, "Guilty of manslaughter." The judgment was reversed, with directions that the prisoner should be retried for manslaughter. In this case there was, of course, no plea of former acquittal of the murder.

The next case in order is *People v. Apgar*, 35 Cal. 389, in which the point here in controversy was directly involved in a question of jurisdiction. The defendant had been indicted for a felony (assault with a deadly weapon, etc.), and convicted of a simple assault (a misdemeanor), from which he appealed. But the supreme court had no jurisdiction, except of felonies; and it seems to have been considered that its jurisdiction of the appeal depended upon the question whether, in case of reversal, the defendant could ever be tried again for a felony. With reference to this point, Chief Justice Sawyer, delivering the opinion of the court, said: "Upon the principle of these cases [*People v. Gilmore* and *People v. Backus*], the defendant is acquitted of the higher offense charged, *and cannot be tried again for it, so that the case, as to that offense, is wholly ended. He was only convicted of the lowest offense embraced in the indictment, and, if the judgment were reversed, he could only be tried for that offense.*" (Italics mine.) Accordingly the appeal was dismissed.

These cases, as to the point under discussion, have never been overruled or questioned by this court, nor, so far as I can discover, by any court, until now, unless the expression used by Justice McFarland in delivering the opinion of the court in *People v. Lee Yune Chong*, 94 Cal. 386, 29 Pac. 776, should be held to have that effect. But clearly it cannot be regarded as a ruling upon the question, being as purely obiter as any dictum that ever found its way into a judicial opinion. In that case the jury had brought in a verdict of murder, without specifying the degree, and the court, failing to notice the defect in the verdict, had discharged the jury. After the jurors had dispersed and gone their several ways, the judge ordered them to be brought into court again, and, after ordering the verdict as recorded to be set aside, instructed those who had been jurors to amend their verdict by specifying the degree of the crime. This they did by re-

turning a verdict of murder in the first degree, and fixing the punishment at imprisonment for life, upon which judgment was entered accordingly. The defendant, without moving for a new trial, appealed from the judgment, and from orders of the court denying his motions for the entry of judgment of acquittal and for his discharge. Upon this state of the case, counsel, in addition to his claim that the second verdict was void and the judgment necessarily erroneous—as to which there was scarcely room for controversy—contended that this court, in reversing the judgment, could not order a new trial—first, because he had not asked for a new trial, and to subject him to a new trial without his request would be putting him twice in jeopardy; second, because the order of the court setting aside the verdict rendered before the discharge of the jury “expunged” that verdict from the record, and left the case in the same position as if the jury had been discharged without a verdict and without necessity, wherefore a new trial would be a second jeopardy; and, third, because a verdict of murder which fails to specify the degree is equivalent to no verdict, and, therefore, that the jury had been discharged without a verdict and without necessity. These were all the points made in the argument or presented by the record in that case, and it will be seen by reference to the opinion of Justice McFarland that they were each taken up, discussed and overruled, upon the authority of numerous prior decisions of this court. After having thus disposed of every question in the case, the remark quoted by Justice Garoutte was evidently superfluous, as it was entirely harmless. It was also, as applied to that case, true; for, since there was nothing in the recorded proceedings of the superior court to give color to a claim or former jeopardy, it could only have been supported by proof of facts dehors the record, for which purposes a plea would have been necessary. Against this expression found in the *Lee Yune Chong* case may be set the more deliberate utterance of the court in a more recent case, in which the point under consideration might have been, but was not, decided. In *People v. Gordon*, 99 Cal. 232, 33 Pac. 903, Belcher, C., after quoting section 1180 of the Penal Code, *supra*, proceeds to observe: “There can be no doubt that the granting of a new trial, upon the application of the accused, of an offense of which he has been convicted, places him in the same posi-

tion as if no trial had been had; but if it was meant by the section quoted to go further, and provide that when the indictment charges two or more offenses, and on the first trial the accused is acquitted of one of the offenses charged and convicted of another, the granting of a new trial of the offense of which he was convicted places him in the same position, as to the offense of which he was acquitted, as if no trial had been had, and thus subjects him to be tried again for the last-named offense, then the section is clearly in conflict with the provision of the constitution above quoted, and for that reason void: See *People v. Gilmore*, 4 Cal. 376, 60 Am. Dec. 620; *Cooley on Constitutional Limitations*, 6th ed., p. 401, and cases cited."

The foregoing review of the California cases presents everything, so far as I have been able to discover, that has been decided or said with reference to the precise point involved in this case. To sum up the result, it appears that there have been three decisions in favor of the doctrine for which I am contending, and none against it. There has been one dictum, which, construed with reference to the case in which it was pronounced, is not really against it, and another, in a later case, distinctly upholding it.

Turning next to the decisions cited as authority in the opinion of the court, we first encounter the case of *Commonwealth v. Olds*, 5 Litt. (Ky.) 140. The defendant in that case having been placed upon trial, the jury was discharged without a verdict. When brought to trial a second time, he moved to be discharged on the ground of former jeopardy. This motion, which the court of appeals held to have been in effect a plea in bar, upon the facts alleged as to the discharge of the jury, was by the county court "decided against him as clearly as if it had been done on demurrer": Page 141. Nevertheless, that court permitted him to argue the question before the jury, and the result was a verdict of some sort in his favor. The report does not show what the verdict was, but, as the commonwealth appealed, I conclude that it was a verdict of former jeopardy, rather than a verdict of not guilty. The court of appeals reversed the judgment, not upon the ground that the defense had not been pleaded (they held expressly that it had been pleaded), but upon the ground that the facts alleged did not constitute a bar. What they actually decided was that the Bill of Rights contained in the Kentucky constitution added nothing to the common-law

doctrine of former jeopardy, and, consequently, that it could not be made a defense, unless there had been a verdict and a judgment of acquittal or conviction. In discussing the common-law rule they did state incidentally the unquestioned proposition "that these two pleas [autrefois convict and autrefois acquit] must be pleaded in bar, and that they cannot be given in evidence under the general issue." But this language was used, not with reference to the case before them, in which there was no question as to sufficiency of the plea, but with reference to the ordinary case of a second indictment for the same offense, as clearly appears by the language immediately following: "That when such pleas are made the great question is whether the former indictment pleaded in bar would admit the same evidence with the one to which it is pleaded." The same criticism disposes of the quotation from *People v. Orwell*, 28 Cal. 462. The remark there made occurs in the course of a general discussion of the common-law doctrine of former jeopardy, and is sustained by a reference to *Commonwealth v. Olds*. The proposition advanced no one would think of questioning, but it will be noticed that it applies expressly and solely to the case of a second indictment. There was no question in that case as to the necessity or sufficiency of a plea of former jeopardy. The defendant had appealed from the judgment upon conviction for murder without moving for a new trial, and was contending that upon a reversal of the judgment the supreme court could not order a new trial, first, because there can never be a new trial after reversal of a judgment of conviction; and, second, because, if there could be a new trial after verdict in any criminal case, there could be none where none was asked for. Both the points were ruled against him. The court did not hold, and could not have held, that he must plead his former jeopardy; for they held as matter of law, upon the record, that there was nothing to sustain the defense. Before taking leave of this pair of cases, it is not out of place to remark that *Commonwealth v. Olds* was expressly overruled by the court of appeals of Kentucky in *O'Brian v. Commonwealth*, 9 Bush (Ky.), 345, 15 Am. Rep. 715, as to the very point upon which it was cited in *People v. Orwell*; and the doctrine of the latter case, following the passage quoted, is certainly not now the law of this state, if it ever was. The defense of former jeopardy,

under our constitution, certainly does include more than was comprehended by the common-law doctrine, and may be maintained where a good plea of autrefois convict or autrefois acquit could not have been made.

The next case cited to sustain the opinion of the court is from Tennessee—*Zachary v. State*, 7 Baxt. (Tenn.) 1, decided in 1872. This case seems a little nearer being authority than any that is cited; for it did present the question under consideration here, and the court did express an opinion upon it. The defendant had been indicted in four counts, convicted upon the first, and acquitted upon the last three. Brought to a trial a second time, he moved the court to limit the trial to the first count, which motion was overruled. But the jury again acquitted him on the last three counts, and convicted him only upon the first. He appealed, however, to the supreme court, assigning error upon the ruling denying his motion, and also a number of other errors. The supreme court, in an opinion which cites not a single authority, disposes of seven assignments of error, devoting one of its shortest paragraphs to this particular one. I quote it in full: "It is said the prisoner was improperly put upon trial the second time upon the three last counts, because he had been acquitted on those on a former trial. The question was raised by motion, and not by plea of former acquittal. It was properly overruled. The question should have been raised by plea setting forth the record of the former trial and acquittal. But, even if there was error, it could not avail the defendant now, as he was again acquitted on the counts referred to. He appeals from a judgment of conviction on the first count, having been acquitted on the other counts." In other words, the court, ignoring its own previous and well-considered decision to the contrary (*Campbell v. State*, 9 Yerg. (Tenn.) 333, 30 Am. Dec. 417), and without assigning any reason or principle to sustain its conclusion, says: "There was no error, but, if there was, it was harmless." If such a decision could be dignified with the name of authority under any circumstances, I think its claim to that distinction will disappear when it is set beside the decision in *Campbell v. State*, *supra*. I quote the brief statement of the case from the syllabus prefixed to the report: "The defendant was acquitted upon the first and third counts, but convicted on the second. He moved for a new trial, which

was granted, and the entire verdict set aside by the court. Upon the second trial he moved the court to put him on trial upon the second count only. This the court refused. Upon the second trial he was acquitted on the first and second counts, and convicted on the third. Held, that it was error in the court to set aside the verdict entirely, and that plaintiff was entitled to judgment of acquittal upon the first and third counts, because upon these he was acquitted by the jury upon the first trial, and that he was also entitled to judgment of acquittal upon the second count, because he was acquitted on that count upon the second trial." I call attention to the fact that in this case defendant made his defense by motion, and not by plea; to the further fact that the question here in controversy, being directly and necessarily involved, was, after full discussion and examination of authorities, clearly decided, and the defense of former acquittal sustained, by the court, as a pure question of law arising upon the record, and requiring no evidence aliunde to support it. It is to be noted, moreover, that this case was in 1854 cited and followed in Tennessee in *Slaughter v. State*, 6 Humph. (Tenn.) 410, and that these two cases, with one other from Mississippi, are the only authorities cited to sustain the decision in the leading California case—*People v. Gilmore*, supra. It is further to be noted that it has never been overruled or questioned in any particular in Tennessee, but, on the contrary, has been cited and followed on various points: In 1851, in *Esmon v. State*, 1 Swan (Tenn.), 15; in 1857, in *Major v. State*, 4 Sneed (Tenn.), 608; in 1860, in *State v. Lea*, 1 Cold. (Tenn.) 177; and in 1871 in no less than three cases (*State v. Cameron*, *State v. Irvine*, *Mikels v. State*), reported in 3 Heisk. (Tenn.) 85, 158, 330. In view of all which, and considering that the rule so established was a rule for the enforcement of a constitutional right, the loose expression contained in a single line of the opinion in *Zachary v. State* with reference to a point not necessary to the decision, and really not decided, can scarcely be called authority. Can it be supposed for a moment that the court would have deprived the prisoner of the benefit of his motion if their decision had depended on his right to present his defense in that form, or that they would have said what they did say if the point had been of any practical importance, and had been ever so little argued at the bar?

The next case cited as authority for the decision of the court is *State v. Washington*, 28 La. Ann. 129. It has no application, because the prior conviction was upon another indictment and in another court, and, in terms, for another crime. Of course, it could only be made a defense by plea.

The next case is *Pitner v. State*, 44 Tex. 578. In that case the petitioner was asking the court, upon habeas corpus, "to try the issue of *autrefois acquit*." The court decided, as this court has decided in similar cases, that habeas corpus was not the proper remedy: *Ex parte Cage*, 45 Cal. 248. In so deciding they said that his proper course was to enter a plea in the court where the indictment was pending, and this was true, if his defense involved the proof of any fact dehors the record. The report does not show what his defense rested upon, but we are bound to assume that it did not rest exclusively upon the record of the case in which he was held, because the rule had been established by a previous decision of the same court that without any plea the defense of former acquittal in the same case is available in arrest of judgment: *Jones v. State*, 13 Tex. 168, 62 Am. Dec. 550. This was a case in which the defendants were granted a new trial after conviction of murder in the second degree. On their second trial they were convicted of murder in the first degree. It does not appear from any express statement in the opinion of the court or by the reporter that the defendants failed to interpose a plea of former acquittal of murder in the first degree. But the fact does clearly appear from the statement of counsel for defendant (pages 170, 171), which is not controverted by the attorney general. This shows that, without having entered any plea, they moved in arrest of judgment, and the argument of counsel is: "The trying them, therefore, on the original charge the second time, and convicting them, was erroneous, and they could avail themselves of it in arrest of judgment. It was not necessary to plead it specially, for it appeared on the face of the record": Page 171. Upon this question the court, after reviewing a number of authorities, including the Tennessee and Mississippi cases cited by our former supreme court, in *People v. Gilmore*, concluded the discussion as follows: "The result of our investigation is that, both on principle and on the authority of adjudged cases, the appellants, after having been acquitted of murder in the first degree and found guilty of murder in the second

degree, could not be legally tried and convicted of murder in the first degree, and the verdict so finding them cannot stand as the basis of a judgment and execution thereon." This case, it is to be further remarked, has never been doubted or questioned in Texas, but, on the contrary, has been cited and followed in at least fourteen subsequent cases, and, upon the precise point here in question, in *Baker v. State*, 4 Tex. App. 232; *Cheek v. State*, 4 Tex. App. 448; *Robinson v. State*, 21 Tex. App. 162, 17 S. W. 632; *Parker v. State*, 22 Tex. App. 107, 3 S. W. 100. I quote the following from *Robinson v. State*, 21 Tex. App. 162, and 17 S. W., page 633: "Special pleas of former acquittal or conviction, as are provided for by statute (Code Cr. Proc., art. 525), are pleas allowable, and in most instances required, in subsequent prosecutions separately instituted for an offense which has before been tried in some other tribunal, or in the same court under another and distinct proceeding from the cause in which the pleas are interposed, and where they are essential in order to present before the court matters dehors the record before the court. Such pleas are unnecessary, and are not required in the same tribunal where the record then before or within the judicial knowledge of the court presents all the facts concerning the former trial and its result. In such cases the court is bound to take cognizance of the facts. They are a part and parcel of the case before the court, and the defendant is not required to plead them."

The next case cited by the court is *State v. Barnes*, 32 Me. 534. It has no application. The former conviction (for libel) in that case was in another county, and, of course, in another court and upon a separate indictment: Page 532.

The next case cited is *Rickles v. State*, 68 Ala. 538. The report does not state any facts, and all that the decision says is that "in criminal procedure a plea of *autrefois acquit* or *convict* is necessary in order to authorize the introduction of evidence of a former proceeding establishing the acquittal or conviction of a defendant charged with any crime. (*Italics mine.*) This is a proposition which no one will question, and the court rightly says that section 120 of our Penal Code declares the same principle; for that is precisely what it does declare, and all that it declares, viz., that without the plea evidence cannot be introduced. Of course it cannot. Evidence in jury cases is for the jury, but the record and its

legal effect are for the court. If the case is such that the defense of former acquittal can only be established by evidence aliunde the record, there must be a special plea to raise the issue for the jury; but, if the defense appears on the record, no evidence is required, and, if no evidence, of course no plea. That the supreme court of Alabama meant this, and nothing more, is not only evident from the language above quoted, but is confirmed by the fact that it was at the date of the decision cited the established doctrine of the court. In *Bell v. State*, 48 Ala. 684, the precise question under discussion was directly presented, and decided in accordance with the view for which I am contending. Upon the trial of any indictment charging both burglary and larceny, the prisoners were found guilty of the former only. A new trial having been ordered, they entered a plea of former acquittal of the larceny. But the court sustained a demurrer to the plea, and it was not submitted to the jury; and they were convicted on the second trial only of larceny. They then moved in arrest of judgment "on the ground that it appeared from the records of the court in the identical cause that the defendants had at the former trial been acquitted, on the identical indictment in the present case, of the identical and same offense of which the jury found them guilty in the present case," etc. The motion was overruled, and the defendants appealed, assigning three errors: (1) The order sustaining the demurrer to their plea; (2) the order overruling the motion in arrest of judgment; (3) the refusal to discharge them. If the court had deemed the plea necessary, it could only have reversed the judgment on the first ground, and remanded the cause, with directions to overrule the demurrer and submit the issue of *autrefois acquit* to a jury. But it did no such thing. It decided the whole case on the questions of law presented on the last two grounds, giving judgment as follows: "The judgment of the city court is reversed, and a judgment must be here rendered discharging the appellants." And the opinion abounds in such expressions as this: "The legal effect of that verdict of acquittal of larceny, whether any judgment was rendered on it or not, was to put the alleged larceny as completely out of the indictment and case as if it had never been in the indictment or case"; citing our own case of *People v. Gilmore*, 4 Cal. 376, 60 Am. Dec. 620, the *Tennessee* and *Mississippi*

cases which it cites, *Jones v. State*, *supra*, and a large number of cases from other states of the Union.

It remains only to notice the citations from Bishop's Criminal Procedure, in order to bring this review of the authorities referred to in the opinion of the court to a close. Section 744 merely states, in Mr. Bishop's picturesque style, the undoubted proposition that, if the defendant has a particular matter of defense to prove by evidence, he must plead it. At section 813 he is speaking of a defense to a second indictment, as is manifest from his citation of *State v. Barnes*, *supra*, and in fact the whole chapter (sections 803-831) is devoted almost exclusively to cases of second indictments. But in section 821 he says: "A discharge of the jury after jeopardy begun, without verdict or the prisoner's consent, operates in law as an acquittal; and on motion, without plea, he is entitled to be set at liberty." And at the end of section 826 he says: "Assuming the record to be so made as to show the facts, it is plainly within the American doctrine to give it effect without the help of a plea." But it is at section 1271, volume 1, that he states the rule applicable to this case, as follows: "But sometimes the order for a new trial extends, by its terms or interpretation, only to a part of the indictment, and then the second trial is limited to such part." Such was the case here. The order for a new trial, by its plain legal construction, extended only to that part of the charge against the defendant upon which he had been convicted, and as to which he had been granted a new trial. This proposition is established, not only by the decisions directly upon the point in Tennessee, Texas and Alabama, which I have quoted for the purpose of demonstrating the irrelevancy of the citations from those states contained in the opinion of the court, but also by the decisions of this court in *People v. Gilmore*, *People v. Backus*, and *People v. Apgar*, *supra*. It is also sustained by the decisions in many other maturely considered cases in other states, as I shall proceed to show.

In *Atkins v. State*, 16 Ark. 568, the question was one of former jeopardy arising out of the discharge of a jury without a verdict, and, as claimed by the prisoner, without necessity. He attempted to plead his defense, but his plea was held to be bad in substance both by the circuit court and by the supreme court so that it became necessary to

determine whether he could make his defense without plea. As to this point the court said: "It was objected by the attorney general that the defendant could only raise the question of his right to discharge by plea, and not by motion. The objection is not well taken in this case. The defendant moved for his discharge immediately after the court discharged the jury. The facts were all known to the court, and put upon its record. It was the action of the court in progress of the trial that the defendant complained of, and, the court being cognizant of its own proceedings in the premises, no plea was necessary to enable it to determine the legal effect of discharging the jury under the circumstances. The facts being upon record, the question of the right of the defendant to be discharged from further prosecution could be raised by motion, or in arrest of judgment." A peculiar interest attaches to this case from the fact that it involved the same questions, arising in the same way, as were involved in what may justly be termed the great case of *Reg. v. Winsor*, 10 Cox C. C. 276, in which for the first time the defense of former jeopardy based upon the discharge of a jury without verdict in a case of felony, was considered by the highest courts of England. The prisoner having been once put upon trial on an indictment for murder, and the jury having been discharged without a verdict, when brought to trial a second time she moved to be discharged on account of the former jeopardy. Her motion was overruled, and she was convicted, and sentenced to death. The case was taken by writ of error to the queen's bench, and from that court to the exchequer chamber. There was not only a very thorough and elaborate argument of the whole case by counsel for the prisoner and the solicitor general for the crown, but in the queen's bench, where the hearing extended over several adjournments, all the judges freely participated in the discussion. The result was that they decided every point in 1866 precisely as it had been decided eleven years before by the supreme court of Arkansas in *Atkins v. State*, basing their conclusions upon the same grounds, though referring exclusively to English authorities. One of the questions necessarily involved in the case was whether the defense of former jeopardy could be considered upon writ of error without plea. It seems to have been assumed as a matter

of course by most of the judges that it could, but it is incidentally alluded to in the opinion of Blackburn, J., at page 316, where the same distinction is made that was afterward more tersely stated by Erle (page 329) in delivering the opinion of the exchequer chamber: "That which would be matter of plea to a fresh indictment would be ground of error upon a second trial upon the same indictment." Upon the merits of the case it was held, as in *Atkins v. State*, that the discharge of the first jury was justified by the circumstances, and that the claim of former jeopardy was not sustained. The point decided in *Atkins v. State*, that defense of former jeopardy could be made without plea, has arisen in several subsequent cases in Arkansas, and has always been decided in the same way. In *Johnson v. State*, 29 Ark. 34, 21 Am. Rep. 154, the court say: "The record of the former implied acquittal of the appellant of murder in the first degree being before the court in the very cause which it was trying a second time, it was the duty of the court to tell the jury that they could not find him guilty of that grade of offense, if such be the law, even if the appellant had not interposed a plea of former acquittal: *Atkins v. State*, supra." In *Lavender v. Hudgens*, 32 Ark. 767, and in *Ex parte Barnett*, 51 Ark. 217, 10 S. W. 492, decided in 1888, the same doctrine is still maintained.

The case of *Brennan v. People*, 15 Ill. 511, was like our case of *People v. Gilmore*, except that *Brennan* at his second trial did not plead former acquittal. The court held, nevertheless, that the order for a new trial, though general in terms, embraced only the offense of manslaughter, of which he had been convicted, and not the offense of murder of which he had been impliedly acquitted, and, therefore, that he was improperly tried the second time for murder. The case was remanded, that he might be tried for manslaughter. The decision has been followed upon various points in a great number of cases that have since arisen in Illinois, and on the precise point under consideration, in 1880, in *Logg v. People*, 8 Ill. App. 104, where it is said: "The point is made by the attorney for the people that in order for the defendants to avail themselves of the advantage of the verdict upon the former trial they should have pleaded autrefois acquit of the offense charged in the first count. An examination of the authorities will show that

the practice has not been uniform when the second trial has been had in the same cause, and upon the same indictment. In some of the cases it appears such plea was interposed, in others not, but in all the cases where no such plea was pleaded we have found none where the defendant has been deprived of the benefit accruing to him by such acquittal. Where a new indictment is preferred after acquittal upon a former one, there are good reasons for such plea, for it is essential that the identity of the accused and the offense charged should be established as facts upon the trial. These reasons, however, do not exist when the defendants are re-arraigned upon the same indictment and record for a new trial; for there, in contemplation of law, and we might say of fact, also, the whole record is before the court for its inspection, and no question can be made that it is not the same charge, and no proof is required to establish the identity of the defendant. It would therefore seem that, according to the rules of pleading, no necessity exists for a special plea in such a case. As we understand the rule, when it is desired to spread before the court, and make them a part of the record, facts aliunde the record, in defense as a bar to the further prosecution of the cause, then it must be done by special plea; but, where the facts relied upon in defense fully and conclusively appear from an inspection of the record then before the court, no such plea is, or should be, required." I have quoted these remarks to call attention to the fact that, although the plea of former jeopardy, acquittal, etc., has frequently been interposed in cases like this (out of abundant caution of counsel no doubt), the defense has never been rejected for want of a plea in any of the numerous cases in which it was not interposed.

State v. Tweedy, 11 Iowa, 350, was in all material respects like Brennan v. People, *supra*, and the decision was the same. The opinion discusses the question fully, and the result is fairly summed up in these words: "The court, in its instructions in chief, as also in those asked by the state, and given, expressly tell the jury that under the indictment they could find the defendant guilty of murder in the second degree. As the record itself, as we view it, shows an acquittal of this offense, we think the instructions were erroneous (without reference to the refusal of the one asked by the defendant on the same subject), though the plea

of former acquittal was not formally pleaded." This case has been often cited as authority in Iowa, and, as to this particular point, affirmed in *State v. Boyle*, 28 Iowa, 526, and *State v. Clemens*, 51 Iowa, 275, 1 N. W. 546. The Mississippi cases are to the same effect: *Hurt v. State*, 25 Miss. 378, 59 Am. Dec. 225; *Morris v. State*, 8 Smedes & M. 762. And in Missouri the same: *State v. Ross*, 29 Mo. 48; *State v. Jenkins*, 36 Mo. 372; *State v. Brannon*, 55 Mo. 63, 17 Am. Rep. 643. And in Wisconsin: *State v. Martin*, 30 Wis. 216, 11 Am. Rep. 567. And in Virginia: *Lithgow v. Commonwealth*, 2 Va. Cas. 297; *Stuart v. Commonwealth*, 28 Gratt. (Va.) 953. It is to be noted that the legislature of Virginia, not being under any constitutional restriction on this point, in 1878 enacted a statute providing that, if a verdict should be set aside on motion of the defendant in a criminal case, it should open the whole issue, since which time the courts have followed that law: *Briggs v. Commonwealth*, 82 Va. 560. The following cases, less directly in point, but illustrating the principle, are referred to: *People v. Barrett*, 2 Caine (N. Y.), 304, 2 Am. Dec. 239; *Ned v. State*, 7 Port. (Ala.) 187; *State v. Kittle*, 2 Tyler (Vt.), 471; *People v. Goodwin*, 18 Johns. (N. Y.) 187, 9 Am. Dec. 203.

These are all the authorities on the point I have been able to find in the limited time at my disposal. No doubt, there are other—and possibly conflicting—decisions in other states, but, if so, I can only say that the citations in the briefs of counsel and in the previous decisions of this court afford no clew to their discovery. And, if the law is as laid down in the above-quoted authorities, it plainly appears that the reasons assigned for the present decision are wholly insufficient. It is said that the practice of raising the question of former jeopardy for the first time on motion for a new trial is a novel one. This may be granted, but the answer is plain. It is only novel because it is made so by the novel provisions of our Penal Code. The cases above cited show that the practice of raising the question by motion in arrest of judgment is common and approved where that motion may be based upon any error appearing on the record. But in this state the motion in arrest of judgment is limited to defects appearing on the face of the indictment: Pen. Code, secs. 1183, 1004. If a jury were to

bring in a verdict of murder under a good indictment for manslaughter, the defendant could not, under the terms of our statute, avail himself of the objection by motion in arrest of judgment. But it is certain that he could do so by motion for new trial on the ground that the verdict was against law: Sec. 1181, subd. 6. In other words, our statute has made the motion for new trial applicable to cases in which the former practice was to move in arrest of judgment. In abridging one remedy, the legislature has simply enlarged the other. It is next suggested that this mode of procedure would entirely do away with the immemorial practice of pleading former jeopardy. As to this, if it were true, as the argument assumes it to be, that the only office of the plea of former jeopardy (I use the term in its original and generic sense, in which it comprehends pleas of former acquittal, former conviction and former jeopardy based upon the discharge of the jury without verdict) is to enable the court to take the verdict of a jury as to the existence and legal effect of its own recorded proceedings in the very case it is trying, we could part with so useless a proceeding without regret. But the apprehension of losing these venerable pleas is entirely groundless. They would still remain for the only purpose they have ever served, viz., to raise an issue of fact in cases involving the resort to evidence aliunde the record. It is next suggested, as another absurd consequence of this novel practice, that this defendant, and others in like situation, could never be convicted of the minor offense of which he was formerly convicted. This apprehension is also unfounded. The court has only to instruct the jury that the defendant is on trial for the minor offense; has only, in other words, to tell the jury what the issue is that they have been sworn to try. Finally, some weight seems to be allowed to the suggestion that the defendant was guilty of trifling with the court, in sitting idly by, during the progress of the trial, and allowing himself to be tried upon a charge that was out of the case. I think this is a reproach that is scarcely deserved. A prisoner ought not to be expected to know better than the court and counsel for the state what he is being tried for. It is the business of the prosecuting attorney, if of anyone, to call the attention of the court to the nature of the charge. But in this case it appears very clearly, from matter which the district attor-

ney has taken pains to incorporate in his bill of exceptions, that the defendant and his counsel, no less than the court, were unaware of the legal effect of the former verdict and of the order for a new trial, and supposed that he was on trial for, and could be convicted of, the higher offense of which he had been formerly acquitted. Counsel discovered their mistake, however, in time, and moved for a new trial, as they had a right to do, upon the grounds, among others, that the court erred in instructing the jury that the defendant could be found guilty "as charged," and that the verdict was contrary to law, because it convicted him of an offense of which he appeared by the record to have been acquitted. The superior court, not deeming itself to have been trifled with, but recognizing its own error, granted the motion for a new trial upon this ground, and in my opinion the order should have been affirmed.

GAROUTTE, J.—The question here presented is purely one of procedure, and I have neither the time nor the disposition to devote any great amount of labor to it. But, in view of the lengthy discussion presented by the chief justice, I feel it due to myself and associates who opposed a rehearing of the original case to add a few words at this time upon the question of jeopardy. In this state, for forty-seven years, the practice has been universal to plead the special defenses of former acquittal and former conviction; and likewise has been the practice as to the plea of jeopardy, since there has been such a plea recognized by the statute of this state. It has been a practice so well understood and settled in this state that no lawyer, during that period of forty-seven years, has ever questioned it. This case presented it for the first time, and was decided in line with the law as it had always been supposed to be in this state. I see no mischievous consequences to follow from a continuation of this practice in the future. Certainly the results following from it in the past have been entirely satisfactory. The single question presented to this court upon the former appeal of this case (114 Cal. 56, 45 Pac. 1013) was, May a defendant for the first time upon motion for a new trial raise the question of a former jeopardy? There can be no question but that the legislature had the power to enact a law to the effect that no former jeopardy would be avail-

ing unless presented by a plea. By every fair intendment the legislature of this state has so provided, and beyond doubt such ought to be the law. That evil results would follow from any other course, I have pointed out upon the former appeal. The California cases cited by the chief justice have no bearing whatever upon the question of the necessity of a plea of former jeopardy, and the only case in this state where the matter is presented to this court is *People v. Cage*, 48 Cal. 329, 17 Am. Rep. 436. At the time that appeal was here the statute did not provide for a plea of once in jeopardy, and, the defendant at the trial desiring to raise the question of jeopardy, this court held that it might be raised under the plea of not guilty. But the court only so held by reason of the peculiar wording of the statute. The entire decision is to the effect that, if the statute at that time had allowed a plea of once in jeopardy, then the defendant would have been bound to make that plea. There is no doubt but that, in view of the embarrassment in which the court at that time found itself, the legislature immediately thereafter felt called upon to enact the law as it now stands, requiring a defendant to plead his jeopardy in order that he may rely upon it. But that case certainly does hold that the question of once in jeopardy must be raised during the progress of the trial in some way. In the Bennett case it was not even suggested until the motion for a new trial was made.

The right to raise the question, being a mere constitutional privilege extended to the accused, may be waived by him; and, under the statute of this state, that privilege must be held to be conclusively waived unless raised in the manner provided by law. It is now proposed to differentiate the present case from the general principle declared, upon the ground that the trial upon which the alleged jeopardy took place was had in the same court and upon the same indictment as the present trial. In other words, the contention, reduced to its simplest terms, is this: The former jeopardy being a record of the court, the court, taking judicial notice of its records, knew of the existence of the fact, and was therefore legally bound in some way, and at some stage of the proceedings, to act upon its knowledge, and, not doing so, an error was committed, which demands a new trial of the case. If a prisoner may waive the fact of

previous jeopardy, if that matter be a constitutional privilege only, what possible difference can it make whether the jeopardy occurred in one court rather than another? If, during the progress of the trial, a properly authenticated judgment-roll of another competent court was introduced in evidence, showing a jeopardy of the defendant for the offense for which he was then upon trial, why would not the court know of the fact of the jeopardy as fully and as completely as though it had judicial knowledge of it from its own records? And yet it is not even contended that the court could act in the case of the judgment-roll; and this concession is made for the reason that there was no plea of former jeopardy, and, there being no plea, there was no issue, and, there being no issue, the evidence was incompetent to establish any material fact of the case. A fact of which the court takes judicial notice is only material as evidence at the trial when it tends to prove some material issue, and if, in this case, the court had judicial notice of former jeopardy, the effect of such knowledge upon the part of the court was simply and alone to dispense with proof of the fact in the ordinary way—only this and nothing more. I hold it to be sound, beyond contradiction, that if competent evidence be offered to prove a fact, and it be properly rejected because there is no issue in the case upon that matter, then judicial knowledge of the same fact, existing in the mind of the court, is likewise unavailing to establish that fact. In other words, judicial knowledge of a fact serves no possible purpose upon a trial unless an issue is presented which such fact will tend to prove. By way of illustration, let us assume that during the progress of the trial of a prisoner upon a felony charge an alarm of fire is sounded, and the jurors, breaking away from the control of the officer, mingle with the people, to the extent that they become disqualified, and are at once discharged, and the trial begun anew. Or assume that a trial judge discharges a jury within a few minutes after they have retired to deliberate upon a verdict upon the ground of a failure to agree, thus presenting a doubtful question of jeopardy. Upon a second trial no question of once in jeopardy is raised by the prisoner in either of these cases. After conviction, would any court in the land, upon motion for a new trial upon the ground of once in jeopardy, grant the motion? I do not

believe it. Yet this jeopardy occurred before the same judge in the same court, upon the same indictment, and would appear by the record. If the prisoner does not raise the question of jeopardy, it being an affirmative defense or plea in bar, it must be assumed that he has waived it. It is unquestioned that he can waive it. No one is compelled to set up a plea in bar. It is conceded that the jeopardy may be waived if it occurred in another court. If it may be waived in one court, why not in the other? Perchance this defendant desired a vindication upon the charge of assault with intent to commit murder. Perchance, filled with the knowledge of his own innocence, he was confident of establishing the fact. Possibly he was impressed with a conviction that he could establish an impregnable alibi. And for all or any of these reasons, or many others which could be suggested, he may have gloried in the trial upon the greater charge, and defied his prosecutors. If he had arisen before the judge at the beginning of the trial, and there stated that he had been in jeopardy of the higher offense involved in this information, in some competent court of an adjoining county, or had even stated to the judge the fact that he had been in jeopardy in that court of the higher charge upon that information, but that he expressly waived any question of a former jeopardy, we apprehend that upon a second conviction upon such a state of facts he would have been taken at his word, and would have been required to stand the consequences. The record in this case discloses all this, and more. At the commencement of the trial the information charging the crime of assault to commit murder was read to the jury in his presence, as required by law, and his plea of not guilty to that charge was stated to the jury. The trial proceeded upon these lines, and the evidence was introduced to establish the main charge, until, finally, when the evidence was all in, defendant, by his counsel stated in open court to the jury that he was either guilty of the higher offense, or of no offense, and that he desired the jury to so find. This declaration was not only a waiver of any former jeopardy, but was an absolute repudiation of any such claim.

MOODY v. NEWMARK et al.

L. A. No. 328; November 2, 1897.

50 Pac. 758.

Misjoinder of Parties—Objections.—Where It Does not Appear upon the Face of the complaint that there is a misjoinder of parties defendant, objection on that ground must be taken by answer, under Code of Civil Procedure, section 433, providing that objections to a complaint, not appearing on the face thereof, shall be taken by answer.

APPEAL from Superior Court, Los Angeles County; J. W. McKinley, Judge.

Action by A. S. Moody against Newmark & Edwards and J. S. Robinson. From a judgment against Newmark & Edwards and an order denying them a new trial they appeal. Affirmed.

J. T. Houx for appellants; E. E. Galbreth for respondent.

BELCHER, C.—This action was based upon an order or draft drawn by the defendant Robinson on the defendants Newmark & Edwards, copartners, requesting them to pay to the plaintiff on certain conditions named, a certain sum of money. The order was dated September 24, 1894, and was accepted by the drawees in writing on the same day. The defendants jointly demurred to the complaint upon the ground that there was a misjoinder of parties defendant, and, the demurrer being overruled, answered. The cause was tried by the court, without a jury; and upon the findings made judgment was entered that the plaintiff recover of and from the defendants Newmark & Edwards the sum of \$359.84, and his costs, and that defendant Robinson recover of the plaintiff his costs. From that judgment and an order denying their motion for a new trial Newmark & Edwards have appealed.

The first point made for a reversal is that the court erred in overruling the demurrer to the complaint. We see no error in this ruling. It did not appear upon the face of the complaint that there was a misjoinder of parties defendant, and, this being so, the objection could only be taken, as it was, by answer: Code Civ. Proc., sec. 433.

The next point is that the findings do not support the judgment. The findings are quite full, covering more than five pages of the transcript, and meeting and disposing of all the issues raised by the pleadings. No good would be accomplished by setting them out, and it is enough to say that, in our opinion, they fully justify and support the judgment.

The point is also made that the evidence was insufficient to justify several of the findings; but the point is simply stated, and reference made to the specifications, without any argument based upon it. The evidence set out in the transcript is brief, and, after carefully reading it, we are satisfied that the judgment cannot be disturbed on this ground. We advise that the judgment and order appealed from be affirmed.

We concur: Searls, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

IN re TYLER'S ESTATE.*

Sac. No. 304; November 4, 1897.

50 Pac. 927.

Wills—Attestation of Witnesses—Presumptions.—Where a will on its face does not show that the testatrix subscribed it in the presence of one of the witnesses, or acknowledged to him that she signed it, or declared it to be her will, or that said witness signed it at her request, or in her presence, the law will not presume that all of such acts, being statutory requirements, have been done.

APPEAL from Superior Court, Sacramento County; Matt F. Johnson, Judge.

In the matter of the estate of Anna Tyler, deceased. From an order sustaining a second will, an appeal is taken. Reversed.

F. D. Ryan and James B. Devine for appellant; C. W. Baker and Albert M. Johnson for respondent.

*Rehearing denied.

CHIPMAN, C.—The only question presented here is as to which of certain two wills of decedent should be admitted to probate. Both are conceded to have been executed by the deceased in her lifetime. One is olographic, and is dated June 21, 1882. The other bears no date, but is witnessed, and was found by the court to have been executed in the summer of 1883, and was also found to have been the last will of the said Anna Tyler, and entitled to probate. It is not disputed by any of the contesting parties that the testatrix intended to give all her property to respondent. The sole contention is that the second will was not subscribed by the testatrix in the presence of the attesting witness or acknowledged by her to them to have been made by her; that she did not declare to them that it was her will; that she did not request the witness Berger (one of the attesting witnesses) to sign his name as a witness to the will—all of which requirements it is claimed are imperative to entitle the second will to probate: Citing Civ. Code, sec. 1276; *In re Cartery's Estate*, 56 Cal. 472; *In re McCabe's Estate*, 68 Cal. 519, 9 Pac. 554; *In re Walker's Estate*, 110 Cal. 387, 52 Am. St. Rep. 104, 30 L. R. A. 460, 42 Pac. 815. The attesting clause of the will reads as follows:

"In witness whereof I have hereunto set my hand and seal in the presence of John Heard and ———, who I request to sign their names hereto as subscribing witnesses.

"[Signed] ANNA FOSTER. [Seal.]

"[Signed] JOHN HEARD.

"FRED B. BERGER."

It appeared from the evidence, without conflict, that the signatures of the witnesses, Heard and Berger, were genuine, as was that of the testatrix; that Heard was a lawyer, and prepared the will, and was present at its execution, at the home of the testatrix; that Heard afterward died; that Berger signed his name at the home of the testatrix, and while she was in the room; that the only persons present were the testatrix and her then husband, now deceased, the two witnesses, and the devisee, respondent, then a child of eight years, who testified that she had no recollection of the circumstances attending the making of this second will. It was said by this court in *Re Walker's Estate*, 110 Cal. 387, 52 Am. St. Rep. 104, 30 L. R. A. 460, 42 Pac. 815: "When a will is proved, every exertion of the court is directed to giving effect

to the wishes of the testator therein expressed, but in the proving of the instrument the sole consideration before the court is whether or not the legislative mandates have been complied with." There is here no question as to the wishes of the testatrix, for they were plainly expressed. We have only to inquire whether the "prerequisites to the exercise of the testamentary right in this state" were complied with. In the case before us we have the names of the witnesses and the testatrix subscribed and signed, but the usual certificate of the witnesses that the will was signed by the testatrix in their presence or acknowledged to have been signed by her, and that she declared it to be her will, and that they signed as witnesses at her request and in her presence, is wanting. The final clause of the will purports to state that she subscribed the will in the presence of John Heard, whom she requested to sign his name as witness, and he did so sign apparently. If this, standing alone, can be taken as a declaration that the will was hers, and if, as the evidence seems to show, he witnessed it in her presence, it would still be necessary to show that the witness Berger also signed at her request and in her presence, and that she declared in his hearing that it was her will. The opinion of the learned judge who tried the case is given in the brief of counsel for respondent. We quote: "In this matter this case is in this condition: We have a will that upon its face bears the marks of a perfect execution; all the signatures genuine; the testatrix of a proper age; of a sound and disposing mind; not under duress; all of the parties who were of age sufficient to remember dead, except one, he one of the subscribing witnesses, and his mind a blank as to all the matters respecting its execution. . . . If there was a proper clause of attestation to the will there would be no doubt, for our own supreme court, as well as other states, have settled the question: *In re Gharky's Estate*, 57 Cal. 280; *In re Hunt's Will*, 110 N. Y. 278, 18 N. E. 106. It remains to be seen what the presumption is where there is no attesting clause, as is the case here." The court below manifestly rejected the evidence of Berger in toto as to what occurred when he signed the will as a witness, and decided the matter, so far as Berger was concerned in it, upon the law of presumptions. After a careful reading of

the evidence of this witness we quite agree with the learned judge that we must look alone to the written instrument.

Looking, then, at the attestation alone, such as it was, there is nothing in it to show that, as to the witness Berger, the testatrix subscribed it in his presence, or acknowledged to him that she signed it; nothing to show that at the time of subscribing or acknowledging the will she declared the instrument to be her will; nothing to show that Berger signed the will at the testatrix's request or in her presence. All these positive statutory requirements we are asked to make subordinate to the law of presumptions. It was said in *Re Walker*, supra: "The legislative mandates are supreme, and there is no right to make testamentary disposition except upon compliance with those mandates." It seems to us perfectly obvious that the attestation is wanting in so many vital particulars that to allow it to pass as sufficient, by indulging presumptions, would be going to a greater extreme than has ever been done in any case we have found or which has been cited, and, furthermore, would practically nullify the statute. It is to be regretted that the sole surviving witness was unable to recall the facts of the attestation, as it is also to be regretted that the lawyer called in did not see to having a formal attestation written out and signed by the witnesses, setting forth the acts required by the statute to be done, in which latter case the law of presumptions might have been invoked to some purpose; but as the matter stands, we must hold that the will in question was not sufficiently attested or witnessed and declared, and no presumption of law can now be resorted to in order to supply the statutory requirements wherein the evidence fails. The judgment and order should be reversed.

We concur: Haynes, C.; Britt, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are reversed.

WESTERFIELD v. RIVERSIDE COUNTY.

L. A. No. 324; November 9, 1897.

50 Pac. 929.

Constitutional Law—Compensation of Justices and Constables.
Act of March 28, 1895 (Stats. 1895, p. 267), "to establish the fees of county, township and other officers," etc., in so far as it attempts to give the district attorney a supervisory control over fees of justices and constables in criminal cases, by providing that the boards of supervisors may reject all their bids in criminal cases in which he has not, in writing, approved the issuance of the warrant of arrest, conflicts with constitution, article 1, section 11, requiring all laws of a general nature to have a uniform operation. It is also in conflict with constitution, article 11, section 5, providing that the legislature shall regulate the compensation of county and township officers in proportion to the duties they perform.

APPEAL from Superior Court, Riverside County; J. S. Noyes, Judge.

Action by Jacob S. Westerfield against the county of Riverside. From a judgment in favor of plaintiff, defendant appeals on the judgment-roll. Affirmed.

L. Gill, district attorney, for appellant; Collier & Evans, Harvey Potter and Wilfred M. Pack for respondent.

BELCHER, C.—This action was brought to recover certain sums of money alleged to be due and owing from the defendant to the plaintiff for services rendered in criminal cases by himself and others, as constables and justices of the peace, the claims of the others having been duly assigned to him. It appears that a claim for each of the sums sought to be recovered had been regularly and in proper form presented to the board of supervisors of the county for allowance, and had been passed upon and rejected by the board for the sole reason that the district attorney had not, in writing, approved the issuance of the warrants of arrest referred to in the claim, and under which the services were rendered. The case was tried by the court without a jury, and judgment rendered in favor of the plaintiff, from which the defendant appeals on the judgment-roll.

In 1895 an act was passed by the legislature, entitled "An act to establish the fees of county, township and other officers, and of jurors and witnesses in this state": *Stats.* 1895, p. 267. The act established the fees which justices of the peace and constables might collect in civil and criminal cases, and provided "that the board of supervisors may reject all bills presented to the county by justices of the peace and constables for fees in criminal cases in all cases of proceedings in which the district attorney has not, in writing, approved the issuance of the warrant of arrest": Page 271. Counsel for respondent contend that the above-quoted provision of the act is unconstitutional and void, and counsel for appellant admit that whether it is so or not is the only question involved in the case. We think this question has been, in effect, settled by the decision in the case of *Dwyer v. Parker*, 115 Cal. 544, 47 Pac. 372, where, as stated in the syllabus, it was held that "that portion of the fee act of 1895 which gives the district attorney a supervisory control over fees of justices and constables in criminal cases is void, as being in conflict with section 11 of article 1 of the constitution, providing that 'all laws of a general nature shall have a uniform operation,' as well as in improperly regulating the compensation of officers, in violation of section 5 of article 11." This being so, it is unnecessary to review and discuss the points made by counsel. Upon the authority of the case cited, we advise that the judgment be affirmed.

We concur: Searls, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

IN RE NICHOLS' ESTATE.

S. F. No. 829; November 12, 1897.

50 Pac. 1072.

Insolvency—Liability of Assignee.—An assignee of an insolvent who has acted in good faith and with reasonable care will not be held liable for mistakes of judgment.

Insolvency—Sale En Masse.—The Proper Remedy, where personal property is sold by an assignee of an insolvent en masse, and would have brought a larger price if sold in parcels, is to move the court to set aside the sale.

Insolvency.—An Assignee of an Insolvent cannot be Charged with the difference between what the property brought and what the court held it would have brought if sold in parcels, if he acted in good faith and with reasonable care.

APPEAL from Superior Court, Santa Clara County; John Reynolds, Judge.

In the matter of the estate of J. H. Nichols, an insolvent debtor. Appeal from an order settling appellant's account as assignee. Modified.

I. S. Thompson for appellant; H. E. Wilcox, D. M. Burnett and N. E. Wretman for respondent.

HAYNES, C.—Appeal from an order settling an account of appellant as assignee of said insolvent debtor. The principal question arises out of the sale of certain property of the insolvent by the assignee, the proceeds of which are embraced in said account, and to which account the Madera Flume and Trading Company, a creditor, filed exceptions. Said property was sold at public auction, after due notice, on the twenty-eighth day of July, 1896, and consisted of a planing-mill known as the "Mechanics' Mill," and all its contents, including engines, boilers, belting, four machines, and two horses, two wagons and two sets of harness used in and about said mill, and all of which was used by said insolvent up to the time of filing his petition in insolvency; also about 40,000 feet of lumber, a lot of moldings and mill work, office furniture, including one safe, and the buildings and lease—all of which were sold together as one parcel. At the date of the sale there was subsisting a chattel mortgage to secure the sum of \$1,000 upon the engines, boilers, four machines and belting, used in and about the mill, but it did not cover any of the other property. It also appears that the lessor claimed the engines and boilers as part of the realty. When said property was thus offered for sale as a whole, and not in parcels, and before any bid was made, said Madera Flume and Trading Company objected to the sale in that manner, and demanded that it be sold in parcels, but

said objection and demand were disregarded by the assignee. Several bids were made, and among them said Madera Flume Company bid \$675, and Frank Mabury then bid \$700, and, that being the highest bid made, the property was struck off to him, and before he paid the purchase money said Madera Flume and Trading Company repeated its said protest and demand. When the assignee filed his said account he reported said sale, and prayed that his account be settled and allowed, and said sale approved and confirmed; and in the Madera Flume Company's exceptions the said objections were in effect repeated, and it was alleged that \$700 was an inadequate price, and that if it had been sold in parcels it would have brought a sum largely in excess of \$700, and prayed that said sale be not approved or confirmed, nor said account settled or allowed. Upon the hearing evidence was heard touching the value of said property, but said evidence is not set out in the bill of exceptions. It is only said "that the evidence was conflicting as to the value of said property on the twenty-eighth day of July, 1896," the day on which the sale was made. The court found that at that date said property was of the value of \$850, "and would have realized that amount if sold in parcels," and charged the assignee with the sum of \$150.

In appellant's brief it is said that "there was no evidence establishing the fact or even tending to show that the mill would have brought more if sold in parcels." It is true the bill of exceptions only shows that there was evidence of the value of the property on the day of sale, and is entirely silent as to whether there was evidence tending to show that it would have brought more if sold in parcels. But if there was no evidence of that character the bill of exceptions should have so stated. We cannot presume there was none, since error should appear affirmatively or by necessary implication. Difficult as it must be to determine that a sale in parcels would have produced a given sum in excess of the price at which the property was sold, the finding of the court must be accepted, leaving only the question whether the assignee should be charged with that sum, or any sum in excess of the amount actually received. The insolvency act of 1895 provides:

"Sec. 25. The said assignee shall have power:
(4) From time to time to sell at public auction all the estate, real and personal, vested in him as such assignee, which shall come to his possession, and as ordered by the court.
(5) On such sales to execute the necessary conveyances and bills of sale": Stats. 1895, p. 140.

The order of the court required him to sell all the property of the insolvent then in his hands to the highest bidder for cash, and to execute to the purchaser all necessary conveyances and bills of sale. Neither the statute nor the order required the sale to be made subject to confirmation by the court. In that respect such sales are like execution sales in this state, yet sales under execution are frequently set aside upon motion for irregularities, such as selling en masse when the property should have been sold in parcels, if it is made apparent to the court that a larger sum would have been realized if the property had been sold in parcels: *Hudepohl v. Mining Co.*, 94 Cal. 588, 28 Am. St. Rep. 149, 29 Pac. 1025. This remedy is not confined to sales of distinct parcels of real estate en masse for an inadequate price, but applies also to similar sales of personal property: *Georgeson v. Lumber Co.* (Cal.), 31 Pac. 257. Such is the usual and appropriate remedy (*Boles v. Johnston*, 23 Cal. 226, 83 Am. Dec. 111), and could have been properly resorted to in this case, and, under the facts shown in the record, was the only remedy.

The assignee is a trustee for the creditors, and his personal liability must be determined by the law relating to trustees. As to the degree of care and diligence required of them, the authorities are by no means uniform. The varying facts lead to various modifications in the expressions used by the courts and text-writers. The general result of the cases would seem to be that where the trustee has acted in good faith and with reasonable care, he will not be held liable for mistakes of judgment, and especially will not be held liable for errors of judgment when acting in good faith, in those cases where, as here, the beneficiaries of the trust had full knowledge of the facts, and might have readily protected themselves against loss by promptly moving the court to set aside the sale.

The Civil Code contains the following provisions relating to trustees:

"Sec. 2228. In all matters connected with his trust a trustee is bound to act in the highest good faith toward his beneficiary, and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat or adverse pressure of any kind."

"Sec. 2259. A trustee, whether he receives any compensation or not, must use at least ordinary care and diligence in the execution of his trust."

There is no charge, intimation or finding that the assignee did not act in the highest good faith and with at least ordinary care and diligence, and with a sincere desire to promote the interests of the creditors. He was himself a creditor to the extent of nearly one-half of all the claims proved. He was therefore personally interested in securing the best possible price for the property, and this self-interest is strong evidence of his good faith, and his belief that a sale en masse would bring a better price than could otherwise be obtained. The creditors were the beneficiaries of the trust and the equitable owners of the assigned property, and he was one of such equitable owners. Whether a sale in parcels would produce more was at the time of the sale a matter of opinion. The insolvent had no interest in the property, and was silent. How many of the thirty-one creditors were present does not appear, but the Madera Flume and Trading Company was the only one who requested a sale in parcels. If the matter were to be determined by the creditors, it should have been done in the manner provided for the election of an assignee, viz., by the majority in amount of the creditors present, and the only ones expressing an opinion were the flume company, whose claim was \$520.56, and the assignee, whose claim was \$2,107.37. This may not be conclusive, but it at least disposes of the contention that the assignee was bound to obey the demand that the property be sold in parcels; its only effect being to call the attention of the assignee to a consideration of the question as to which mode of sale would be most beneficial. The finding of the court that the property would have produced \$150 more if it had been sold in parcels is conclusive, in this proceeding, of the fact that the assignee was mistaken; but it does not show that he did not "use at least ordinary care and diligence in the execution of the trust," and that is the measure of his "care and dili-

gence" laid down by the Civil Code as to all trustees. "Where trustees act in good faith and with due diligence, they receive the favor and protection of the court, and their acts are regarded with the most indulgent consideration; but where they betray their trust, or grossly violate their duty, or when they have been guilty of unreasonable negligence, their acts are inspected with the severest scrutiny, and they are dealt with according to the rules of strict, if not rigorous, justice": Burrill on Assignments, 6th ed., sec. 412. In *Crabb v. Young*, 92 N. Y. 66, it was said: "But while trustees are thus held to great strictness in their dealings with the interests of their beneficiaries, the court will regard them leniently when it appears they have acted in good faith, and, if no improper motive can be attributed to them, the courts have even excused an apparent breach of trust, unless the negligence has been very gross." And in the same case (page 67) it was further said: "The presumptions against careless or imprudent conduct on the part of these defendants in the investment and management of this fund are natural and almost irresistible. They are apparently the natural heirs of the plaintiff, and presumptively will be entitled to the trust fund after the termination of her life estate. They therefore have every interest in preserving instead of wasting it." This language is pertinent in the case before us. The insolvency act under which these proceedings were had, as well as the order of the court, is silent as to the mode of selling. In sales under execution personal property must "be sold in such parcels as are likely to bring the highest price," while real estate consisting of several known parcels or lots must be sold separately; but the judgment debtor may direct the order in which the property, real or personal, shall be sold: Code Civ. Proc., sec. 694. In the sale of personal property the officer uses his discretion in the absence of a direction by the judgment debtor, so that this section does not aid the respondent, unless the force and effect which the statute gives to the direction of the judgment debtor should be accorded to the demand of the Madera Flume Company in this case, and that, it is clear, should not be done.

Appellant also excepts to the order of the court directing the payment of the additional preferred claims, upon the ground that there are not sufficient funds for that purpose.

The total receipts reported by the assignee were \$1,043.79. The court approved the disbursements as reported, amounting to \$597.10, leaving a balance on hand of \$446.69. At the time of filing the account the court ordered preferred claims amounting to \$180.05 to be paid immediately, and they were paid before the hearing, leaving on hand at date of hearing \$266.64. At the hearing the court allowed assignee's commissions, \$72; attorney's fees, \$150; and additional costs, \$29.70; total, \$251.70—leaving a balance in the hands of the assignee of \$14.94. The court allowed and ordered paid additional preferred claims amounting to \$253.25. Even if the charge of \$150 against the assignee were proper, there would be a deficiency of \$98.31. The assignee had recovered a judgment in justice's court for \$99.70, and costs, \$11.65; but the case was appealed to the superior court, and had not been tried. A suit was also pending to recover certain real estate. Except as to the matters involved in these suits, all the assets of the estate had been realized. Expenses were necessarily incident to the prosecution of these suits, and the result of them could not be anticipated with certainty. The order appealed from should therefore be modified by striking out the charge against the assignee of \$150, and postponing the payment of the preferred claims until the further order of the court, and that the costs of the trial of said exceptions and this appeal be taxed to the Madera Flume and Trading Company.

We concur: Belcher, C.; Searls, C.

McFARLAND and HENSHAW, JJ.—For the reasons given in the foregoing opinion it is ordered that the court below modify the order appealed from by striking out the sum of \$150 charged against appellant, and directing that the payment of said additional preferred claims be postponed until the further order of the court, and that the costs of the trial of said exceptions and of this appeal be taxed to the Madera Flume and Trading Company, and that as so modified the said order be affirmed.

TEMPLE, J.—I concur in the judgment.

MARCH v. BARNET et al.*

S. F. No. 704; November 17, 1897.

51 Pac. 20.

Attachment—Sureties on Bond to Release.—Plaintiff in an action on a note attached the property of one of the defendants, who gave an undertaking for the release of the attached property under the statute. Held, that where plaintiff obtained a judgment on the note against the defendants, it fixed the liability of the sureties on the undertaking, given to release the attachment to the extent of the undertaking.

Attachment—Sureties on Bond to Release.—In attachment against two defendants, the property of one only was seized, and an undertaking was executed to release the same. Judgment was recovered on the note sued on, and paid by one of the sureties on the attachment bond. Held, that under Civil Code, section 2848, providing that sureties on satisfying the obligation can enforce every remedy which the creditor then has against the principal, to the extent of reimbursing what he has expended, such surety could enforce the judgment on assignment to him against both of the parties, though the property of one only was attached.

Bills and Notes.—Where a Judgment is Recovered Against the Maker and Indorser of a note, and the property of the maker is attached, and the surety on the bond given to release the attachment pays the judgment recovered, and afterward collects the same from the indorser of the note, the only remedy of the indorser is against the maker of the note.

APPEAL from Superior Court, Santa Cruz County; J. H. Logan, Judge.

Action by William F. March against S. Barnet and others. From a judgment in favor of certain of the defendants, plaintiff appeals. Affirmed.

W. D. Story for appellant; Z. N. Goldsby for respondents.

SEARLS, C.—Action to recover \$1,400 and interest for the alleged wrongful taking and sale of certain personal property of the plaintiff. Judgment of dismissal was entered as to C. S. Laumeister, one of the defendants. Final judgment was rendered in favor of plaintiff and against defend-

*For subsequent opinion in bank, see 121 Cal. 419, 66 Am. St. Rep. 44, 53 Pac. 933.

ant Jacob Steen for \$943.41 and costs, and in favor of the defendants S. Barnet, I. Blum, Joseph Blum and J. H. Jacobs for their costs of suit. Plaintiff appeals from so much of the judgment as is in favor of said defendants Barnet, Blum, Blum and Jacobs. The cause was tried by the court, without a jury, and comes up on the judgment-roll without a bill of exceptions.

In October, 1890, O. B. Button brought an action against Jacob Steen, John Ross and W. F. March, the plaintiff herein, on a promissory note made by said Steen, payable to John Ross or order, and by him indorsed to plaintiff, March, who in turn, before maturity, indorsed the same to Button. A writ of attachment issued in said cause, which was levied upon the property of defendant Jacob Steen. Thereupon S. Barnet and one G. Bowman entered into an undertaking in the sum of \$600 for the release of said attached property, as prescribed by section 540 of the Code of Civil Procedure, whereby they undertook and agreed to pay any judgment plaintiff might obtain, etc., whereupon the attached property was released. Plaintiff Button obtained judgment against Steen, as maker of said note, and March, as indorser thereof, for \$625.97 and costs, the suit having been dismissed as to defendant John Ross. S. Barnet, one of the sureties on the undertaking for the release of the attached property, paid to Button the judgment in full, amounting to \$666.39, and took from Button an assignment of the judgment against Steen and March. Barnet assigned the judgment to Isaac Blum, who in turn assigned it to Joseph Blum. The latter caused an execution to issue thereon, which was levied by the then sheriff, C. S. Laumeister, upon one share or interest of March (a defendant in that action and the plaintiff in this) in and to the schooner John Ingalls, of the value of \$1,000, which was sold for \$770 to Joseph Blum, who transferred the same to J. H. Jacobs. The defendants, and each of them, had due notice of the relation which said Barnet bore to the judgment, and that he was a surety on the undertaking, at the dates of the several assignments; and their object was to have the property of the plaintiff herein seized in satisfaction of said judgment, to protect Steen against said judgment, and to reimburse Barnet for the amount paid by him to Button, the judgment creditor, upon taking an assignment of the judgment.

When, in the absence of fraud or collusion, the plaintiff, Button, in the former suit, obtained judgment therein against Jacob Steen, the maker, and William F. March, the indorser, of the note, it fixed the liability of S. Barnet, as a surety on the undertaking to release the attached property, to plaintiff in that action, to the extent of the undertaking, viz., \$600: Freeman on Judgments, sec. 180; Black on Judgments, sec. 587. "A surety, upon satisfying the obligation of the principal, is entitled to enforce every remedy which the creditor then has against the principal to the extent of reimbursing what he has expended": Civ. Code, sec. 2848. The defendants in the former action, viz., Steen and March, were the principals for whom Barnet became liable upon his undertaking. True, it was the property of Steen which was attached, and which was released therefrom upon the execution of the undertaking, but the liability which Barnet agreed to meet was that of both the defendants. Their relation as between themselves was that of maker and indorser of a note, but as between them and their creditor, Button, who was plaintiff in the action, they were each equally liable; and, when afterward Barnet paid off the judgment in full against them, he was entitled, under section 2848, supra, to the assignment of the judgment which he received from Button, and to enforce it by execution against them, to the extent of reimbursing what he had expended, and to the further extent to which he had advanced money due on the judgment so assigned to him. The right which Barnet had by virtue of the statute and of his assignment he could assign to others, and the question of notice cuts no figure in the case. A party holding a general judgment against two or more persons may, at his option, enforce it against either or any of them, leaving them to adjust their rights as between themselves as may be conformable to law and equity. Barnet paid off the judgment for which Steen and March were liable, and, in all justice and law, was entitled to be reimbursed. March, who is the plaintiff here, seems to have indulged the impression that, because he was but an indorser, he could enforce, as against all the defendants here, the rights to which he was entitled as against Steen, the maker of the note. We cannot concur with him in this view, and, as he has a judgment against Steen, we think he has recovered all to which he was

entitled. As was said by Garoutte, J., when this case was here on the appeal of Jacob Steen (114 Cal. 377, 46 Pac. 152): "As to the owner of the judgment, it was the duty of the plaintiff, March, to pay the entire amount without a levy and sale of his property." We may add that if he failed to do so, and permitted his property to be taken and sold in satisfaction of such judgment, he is, as against the respondents, without redress. We recommend that the judgment appealed from be affirmed.

We concur: Belcher, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

DEHAIL et al. v. CITY OF LOS ANGELES.

L. A. No. 325; November 26, 1897.

51 Pac. 27.

Appeal—Dismissal.—Where Plaintiff in an Action to Enjoin the issuance of a tax deed appealed from a judgment against him rendered on his refusal to amend after a demurrer to the complaint was sustained, he abandoned his remedy by appeal by afterward redeeming the property by paying the taxes, etc., and the court will not determine the questions raised.

APPEAL from Superior Court, Los Angeles County; Lucien Shaw, Judge.

Action by I. F. Dehail and others against the city of Los Angeles for an injunction. From a judgment in favor of defendant, plaintiffs appeal. Dismissed.

Murphey & Gottschalk for appellants; W. E. Dunn for respondent.

TEMPLE, J.—This action was brought to restrain and enjoin the issuance of a deed by the street superintendent of Los Angeles. A general demurrer was interposed to the complaint, which was sustained. Thereupon the plaintiff declined to amend, and, judgment having been thereafter entered, took this appeal. Since the appeal he has redeemed

the property by paying the taxes, costs and percentage required. There is therefore nothing practical in the appeal, and to decide the questions raised would be to determine mere abstract propositions. The courts cannot be justly called upon to decide mere moot questions. When the plaintiff redeemed the property, he abandoned his remedy by the appeal, and ought to have dismissed it: *Foster v. Smith*, 115 Cal. 611, 47 Pac. 591. The appeal is dismissed.

We concur: Henshaw, J.; McFarland, J.

CONNOLLY v. WICKS et al.

L. A. No. 242; November 24, 1897.

51 Pac. 37.

Appeal.—Where There is a Conflict in the Evidence, a judgment based thereon will not be disturbed.

APPEAL from Superior Court, Los Angeles County; Walter Van Dyke, Judge.

Action of foreclosure by Eliza Connolly against M. L. Wicks and others. Decree for plaintiff, and defendant Alexander Robertson appeals. Affirmed.

Ben Goodrich for appellant; Stephen M. White for respondent.

BELCHER, C.—On June 1, 1887, the defendant M. L. Wicks executed to Mary Connolly and Patrick Connolly his promissory note for \$20,000, bearing interest at the rate of ten per cent per annum, and to become due June 18, 1888; and to secure payment of the note he, on the same day, executed to them a mortgage on two hundred and eighty acres of land, which contained the following clause: "It is agreed that any forty acres of this land will be released from this mortgage on payment of the sum of four thousand dollars for each and every forty acres so released." On September 7, 1887, Mary Connolly assigned all her interest in the said note and mortgage to Patrick Connolly. On June 22, 1889, Patrick Connolly assigned all his interest therein to John D.

Bicknell, the assignment being absolute in form, but intended only as collateral security for an indebtedness of the assignor. On June 15, 1891, Bicknell reassigned the note and mortgage to Patrick Connolly, and on March 7, 1892, the latter assigned the same to Eliza Connolly, the plaintiff. Shortly after the said mortgage was executed Wicks conveyed all the land covered by it to one R. F. Lotspeich, as trustee, for the purpose of making sales thereof in subdivisions. Lotspeich, as such trustee, conveyed to various persons parcels of the land in tracts of ten and five acres each, and eleven of such tracts were released from the mortgage. On May 31, 1888, Lotspeich sold and conveyed to defendant Robertson twenty acres of the said land for the sum of \$4,000, which Robertson then and there paid to Wicks, who, under the terms of the said trust deed, was to receive all moneys paid for any of the land held by Lotspeich as trustee; but it does not appear that this money, or any part of it, was paid over to the mortgagee, or indorsed upon the said note, and this twenty-acre tract was not released from the mortgage. On March 29, 1892, plaintiff commenced this action to foreclose the said mortgage upon all the land not released therefrom, making a large number of persons parties defendant, upon the ground that they had, or claimed to have, some interest in the mortgaged premises. The case was tried, findings filed, and judgment entered in favor of the plaintiff against defendant Wicks for the amount due on the note and mortgage, with costs and attorney's fees, and ordering all the land sold, and the proceeds of the sale applied in satisfaction of the judgment. In due time defendant Robertson moved for a new trial, which was denied, and then appealed from the order denying his motion.

The contention of appellant is that his land should have been released from the lien of the mortgage, and that the findings to the contrary were not justified by the evidence. It is clear that, if the money paid by Robertson for his land had gone to the mortgagee, and been indorsed as a payment on the note, then, under the clause of the mortgage above quoted, the land should have been released. The amount paid was \$4,000, and, though the land consisted of only twenty acres, instead of forty, that fact was immaterial, as the greater includes the less. But the mortgagee was under no obligation to release any part of his security until he received

the stipulated sum of \$4,000. Of course, he might have released ten acres, or five acres, or even one acre, upon receiving \$100 per acre therefor; but this was at his option. And the fact that he had on several occasions, at the instance of Wicks, released small tracts, did not obligate him to make any more releases of that kind.

To sustain his contention appellant relies mainly upon a transaction between Wicks and Bicknell on the 10th of June, 1890. It appears that Bicknell had told Wicks that the interest on the mortgage note was growing so rapidly that he could not wait commencing a foreclosure, and, as a result, Wicks indorsed and delivered to him a note made by Barclay & Wilson for \$6,000, and bearing interest at the rate of seven per cent per annum; that Bicknell accepted the note, with the understanding that the money, when collected, was to be applied on the mortgage debt; that Bicknell never collected any part of the money due on the said note, but thereafter reassigned the same, with the note and mortgage, to Patrick Connolly; that Connolly instituted suit on the said note, and on July 13, 1891, obtained judgment thereon; that thereafter he collected \$3,000 on the said judgment, and that sum, with the balance due on the judgment, making in all \$6,532, was, on July 5, 1892, credited on the mortgage note. Appellant claims that when the Barclay & Wilson note was turned over to Bicknell there was an agreement that the land sold to him should be released from the lien of the mortgage, and on this agreement he relies for a reversal of the judgment. The court found: "That said defendant Wicks did not indorse said note to said Bicknell solely or at all in consideration of any contract or agreement to make any releases in the future, nor was any such agreement made, but said Wicks assigned said note as part payment on said note and mortgage described in the complaint herein, and not otherwise; that afterward, while the said Bicknell was in possession of the said note and mortgage set forth in the complaint as collateral security as aforesaid, the defendant Alex. Robertson obtained from the defendant M. L. Wicks an order in writing, addressed to the said Bicknell, to devote the first moneys collected from the said note to Barclay and others to release, from the lien of said mortgage, the above-described land purchased by the defendant Robertson of said Lotspeich, trustee; that the defendant Alex. Robertson

delivered to said Bicknell said written order, but the said Bicknell did not promise the said defendant to make a release of said land as soon as the said Barclay & Wilson note, or a sufficient amount thereof, should be collected, and only three thousand dollars of said Barclay & Wilson note has been collected; that the judgment debtors in the judgment against Barclay & Wilson paid on said judgment the amount of three thousand dollars, and said payment, together with the balance of said judgment, was accepted by said Connolly as a cash payment, and as such credited on the note and mortgage in suit, and is one of the credits heretofore found; but these defendants did not become entitled to have said land released from the lien of said mortgage, nor was there ever any contract or agreement that they, or either of them, should be so entitled."

The only question is, Was this finding justified by the evidence? We think it was. It would subserve no useful purpose to set out the evidence in detail. Conceding that there was some conflict, still we are confronted with the rule that, in cases of conflict, judgments will not be disturbed on appeal. The order appealed from should be affirmed.

We concur: Chipman, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order appealed from is affirmed.

YAEGER v. SOUTHERN CALIFORNIA RY. CO.

L. A. No. 240; December 9, 1897.

51 Pac. 190.

Evidence—Exclusion of Irrelevant Testimony.—Where, in an action against a railroad company for personal injuries, the jury found that plaintiff had suffered no injury for which he was entitled to redress, he was not injured by the exclusion of evidence to prove certain special damages.

Evidence—Waiver of Objection.—An Objection not Made to the introduction of evidence when it is offered is waived, and cannot be considered on appeal.

Evidence—Medical Expert.—In an Action for Personal Injuries, where plaintiff had testified to the fracture of the tenth rib, two inches

from the spine, by the accident, it was proper for defendant to show by a medical expert the necessary force to produce such injury, and that it could not have been caused by the accident.

Evidence—Hypothetical Questions.—Where Plaintiff's Evidence tended to show that one of his ribs had been fractured by the accident, and that inflammation of the nerves was the result, defendant's theory that fractured ribs could not have been caused by the accident, and that the condition of the nerves came from alcoholism, exposure or another accident, did not present a case for hypothetical questions.¹

Evidence.—When a Witness Answers After Objection to the question, the objection is not available, in the absence of a motion to strike the answer out.

Appeal.—When a Notice of Appeal is for "Errors of law occurring at the trial," the appellate court will not consider irregularity in the proceedings of the court, the appeal being made from an order denying a new trial, and such questions not being presented to the trial court on the motion.

Trial.—An Instruction to the Jury That, if the Air-brake was properly used to avoid a collision occasioned by the negligence of defendant, and plaintiff was injured by the sudden stoppage of the train, through the application of the air-brake, and not otherwise, they should find for defendant, is a proper instruction, there being evidence to support such a state of facts.

Trial.—An Instruction to the Jury, Given at the Request of the Defendant, "that when weaker or less satisfactory evidence is offered, when it appears that stronger and more satisfactory evidence was within the power of the party, and not offered, the evidence offered should be viewed with distrust," was objected to by plaintiff, because not applicable to the case. Held, that if such instruction was not warranted by plaintiff's evidence, but was applicable to the defendant's evidence, it was not error.

¹ Cited and approved in *Cordiner v. Los Angeles Traction Co.*, 5 Cal. App. 405, 91 Pac. 438, where the court held that "to justify a recovery for future consequences the evidence must show with reasonable certainty that such consequences will follow"; and distinguished the case then being considered from the cited one; also from *Lenz v. Dallas*, 96 Tex. 258, 72 S. W. 59, where objections to abstract questions were sustained on the ground that they were "not confined to the probable effects of the injury."

Cited in *Cordiner v. Los Angeles Traction Co.*, 5 Cal. App. 406, 91 Pac. 438, as falling within the rule that testimony of a medical expert as to future evil consequences of the injury coming to the plaintiff should be confined to such as must come with reasonable certainty.

Cited in the note in 34 L. B. A., N. S., 229, on the liability for injuries to passengers inside a car from sudden starting or stopping of car or train.

APPEAL from Superior Court, Orange County; J. W. Towner, Judge.

Action by Jacob Yaeger against the Southern California Railway Company for damages for personal injuries. Verdict for defendant. Plaintiff appeals from order denying motion for new trial. Affirmed.

H. W. Chynoweth and C. S. McKelvey for appellant; W. J. Hunsaker for respondent.

CHIPMAN, C.—Action for damages alleged to have resulted from a collision on defendant's railroad at the station of Orange. The cause was tried by a jury, and defendant had the verdict. Plaintiff appeals from the order denying motion for a new trial, and on a statement of the case. The complaint alleges that, while plaintiff was a passenger on the car of defendant, a collision occurred at said station, "caused by the negligence of the defendant and its servants; that plaintiff was, through the shock of said collision, thrown against a partition and seat in said car with great force and violence," and, by reason thereof, "was greatly bruised in his body and limbs." As the results of the shock, it is alleged that plaintiff suffered the fracture of a rib, and that his health and strength were permanently impaired. Defendant denies the alleged negligence, and denies that plaintiff was injured in any degree. The evidence is sufficient to support the verdict upon the issues of fact, to wit, whether plaintiff was injured at all, and whether defendant was guilty of any negligence. The questions raised mainly relate to errors of law in excluding or admitting evidence, and in giving or refusing instructions.

1. Plaintiff assigns certain errors in excluding evidence, numbered 2, 3, 5, 8, 20 and 23. They relate to evidence tending to prove special damages. For example, plaintiff was asked what proportion of time he spent in attending to his business (he was engaged in buying and selling and distilling wines and brandy); how long he had been so engaged; what was the nature of the work required in conducting the business; what labor he personally performed. Respondent claims that there was no allegation in the complaint showing special damages, except for services of physicians, and that, in the absence of any such allegation, plaintiff could not

recover for loss of time or profits in business; citing *Smith v. Railway Co.*, 98 Cal. 210, 33 Pac. 53, and other cases. Respondent also claims that the questions were asked for the purpose of showing or enhancing damages resulting from the alleged injury, and, as the jury found that plaintiff suffered no injury for which he was entitled to redress, the answers to the questions would have produced no change in the result, and could not have benefited plaintiff, and therefore there was no error; citing cases, among them *Bradley v. Parker*, 4 Cal. Unrep. 250, 34 Pac. 234. This case presents a ruling as to failure to find a fact where the court had decided the case upon other determinative issues, and it was held that the failure to find the omitted fact caused no injury. The principle is the same as to the admission of evidence. The jury having found, as we must assume, that there was no damage, plaintiff was not injured by excluding evidence that went to enhance that to which he was found not entitled.

2. Witness Clark, plaintiff's attending physician, had testified for plaintiff that he found plaintiff affected with neuritis—inflammation of the nerves in the region of the alleged injury. He was asked: "And, if it extended upward so as to affect the spinal cord, what, in your opinion, would be the effect upon plaintiff?" An objection was made that the result was too remote and uncertain. The witness had testified also that the tendency of neuritis is to extend upward to the spinal cord. But he had not testified that in plaintiff's case he thought it would so tend upward. We think the question called for consequences too remote and speculative. But, even if admissible, plaintiff was not injured by excluding the evidence, as it related only to the amount of damages, and the jury found by their verdict that plaintiff was not entitled to recover at all.

3. Error is assigned in admitting certain documentary evidence of defendant for identification, and also later on for admitting the documents in evidence. The witness Dr. Clark had testified fully as to plaintiff's injuries, and was his principal medical witness. On cross-examination he was shown (as was plaintiff also when on the witness-stand), for the purpose of identification, the medical examiner's report upon an application by plaintiff on August 18, 1893, six months after the alleged injury, for membership in the Bankers' Alliance of California, a life and accident insurance

company. Dr. Clark was the company's medical examiner at the time. These documents contained statements of both plaintiff and Dr. Clark tending to contradict their testimony at the trial as to plaintiff's physical condition. The objection to their identification by the witness himself was that they were irrelevant and incompetent, and not proper cross-examination. It was proper on cross-examination to identify by the witness himself any written statement made by him contradictory of his testimony given in the case adverse to defendant. Defendant was not called upon at that time to offer the contradictory statements in evidence, nor was it called upon then to inquire into them or cross-examine the witness about them. When the defendant came to its side of the case, it could offer them as impeaching evidence. Defendant did this, and the second objection referred to above was made on the ground that the documents had not been identified sufficiently. They were brought into court by the secretary of the Alliance, and were offered as the documents identified previously by Dr. Clark and plaintiff, and were read in the absence of Dr. Clark from the witness-stand, which plaintiff claims was in violation of section 2054 of the Code of Civil Procedure. This section reads: "Whenever a writing is shown to a witness it may be inspected by the opposite party, and if proved by the witness must be read to the jury before his testimony is closed, or it cannot be read except on recalling the witness." This specific objection was not made when the evidence was offered, and the failure to do so was a waiver of such objection, and it cannot be now considered. Had it been made in time, it might have been obviated: *Colton Land & Water Co. v. Swartz*, 99 Cal. 278, 33 Pac. 878; *Brady v. Reese*, 51 Cal. 447, and other cases. The documents, we think, were sufficiently identified by the witness Clark and by plaintiff. The rule as to impeaching testimony, we think, was fully met.

4. Errors noted as numbers 39, 45 and 54 are assigned for admitting certain evidence offered by defendant by medical experts. The point of objection is that the questions did not state facts sufficient as a basis for an opinion; that they did not state the facts elicited in the case in full; that the questions should have been hypothetical, and should have embodied the facts upon which the opinion was desired; or, if the expert had heard all the evidence, then to submit all the

evidence to the expert, assuming it to be true; and that this latter method cannot be resorted to if the evidence is conflicting—in short, that the opinion must be based on the evidence, or upon an hypothesis specifically formed. Plaintiff had introduced evidence tending to prove a fracture—either a complete break, or what is called a “green stick” fracture, of the tenth rib, two inches from the spine. Plaintiff also introduced evidence tending to show that, some time after the diagnosis of a fractured rib, his physician discovered neuritis or inflammation of the nerves which supply the anterior part of the thigh, caused by a blow or compression, and that the lumbar plexus nerves were affected by neuritis. The evidence of plaintiff tended to show that these results came from the accident on the cars, as alleged. Defendant’s witnesses were called to rebut this evidence, and to dispute the cause of the neuritis. It was claimed that the force shown by the collision could not have produced the fracture, and also that the neuritis came from alcoholism, or from exposure, or from another accident that had befallen plaintiff. The witnesses had examined the person of plaintiff. The questions put to the witnesses did not raise the legal propositions suggested by plaintiff. They were calculated to disprove plaintiff’s theory, as evolved from the answers of plaintiff’s witnesses. Defendant’s theory was that the injury claimed was exaggerated and false; that the force from the collision could not have produced such injuries as plaintiff described. It did not present a case for hypothetical interrogation. It was competent to show the amount of force necessary to fracture the tenth rib, two inches from the spine—protected, as it was shown to be, by a heavy layer of muscles in a man such as plaintiff—in order to aid the jury in determining the probability of plaintiff’s evidence being true. And so, of the neuritis, it was competent to show that there was no necessary connection between it and the broken rib, as plaintiff’s witnesses claimed there was. It was not at all necessary to formulate a hypothetical question, embracing all the facts, to show this.

5. Defendant’s witness Ross, a medical expert, had examined plaintiff’s person, and, with other physicians, had used various tests to determine the nature and extent of the injury. He was asked by defendant’s counsel: “What was the result of that examination?” The witness answered: “Basing my

opinion on the testimony I have heard here, and I have heard all on the plaintiff's side—" The witness was here interrupted by plaintiff's counsel, and an objection made to the witness giving any opinion based on the testimony, as incompetent, and not a proper foundation upon which to base an opinion. The witness answered: "I believe this slight enlargement is a thickening of the tissues on the right side, caused perhaps by the application of blisters." It will be observed that the witness was not asked his opinion upon the testimony of other witnesses. He was asked for the result of his own examination. When he strayed from the question, he was checked by counsel for plaintiff; and it is not clear whether, when he resumed, it was in response to the question, or whether he was still speaking from what he had heard from witnesses. The proper course for counsel should have been to move to strike out as not responsive to the question, which was not done. An examination of the full answer of the witness, however, discloses that he testified in fact from his own observation, and not from what he had heard.

6. Plaintiff places much stress upon exception No. 48, in refusing counsel to cross-examine the medical expert witness Wills, called for defendant, upon the galvanic battery and electricity tests applied on plaintiff's muscles. The fact in controversy was whether atrophy of the muscles showed on the injured side of plaintiff, and these tests were to determine whether any real difference existed between his right and left side. The witness had gone into the subject on direct examination, and had been cross-examined to considerable extent. Finally the court interposed, saying: "I do not think we need go any further with this subject. I consider that enough has been said upon that subject. I refer to the question of the galvanic battery and electricity." Mr. Chynoweth (counsel for plaintiff): "Note an exception to the court's ruling." In the case here the witness had testified in reply to counsel that he got the same reaction on both sides of the plaintiff; that he used the same amount of electricity on both sides, and got the same result. It was at the conclusion of his testimony that the court made the remark complained of, and counsel for plaintiff dropped the witness. The witness had answered the last question put to him. Counsel offered no other question. He made no suggestion to the court that he would like to pursue the discovery as to the effect of

changing the poles of the battery, or that any particular subject need further elucidation. Counsel simply acquiesced in what, at most, was an irregularity or abuse of discretion on the part of the court, reserving his objection. The notice of appeal in this case is for "errors of law occurring at the trial," under subdivision 7, section 657 of the Code of Civil Procedure, whereas the error, if error, was irregularity in the proceedings of the court, or abuse of discretion, etc., under subdivision 1 of that section. The appeal is only from an order denying a new trial, and a question not presented to the trial court on the motion cannot be presented here: *Williams v. McDonald*, 58 Cal. 527; *Stoddard v. Treadwell*, 29 Cal. 281.

7. Specification No. 64: The court gave some introductory instructions before taking up those asked by the respective parties, in the course of which the court said: "Witnesses are presumed to speak the truth. This presumption, however, may be repelled by the manner in which they testify, by the character of their testimony, *or by evidence affecting their character for truth, honesty, or integrity*, or by their motives, or by contradictory evidence, and the jury are the exclusive judges of their credibility." The words in italics were excepted to. The objection is that, as an abstract statement of law, the instruction is incorrect; and, as there was no evidence in any manner attempting to impeach the character of any witness for truth, honesty or integrity, the instruction was not relevant to any issue. Numerous cases are cited from courts of other states and this court to the effect that it is error to give an instruction where there is not sufficient evidence to fairly raise an issue of fact to which it relates; that an instruction on an abstract principle, though correct, should not be given. The instruction was a correct general statement of the law, and the language objected to is fully warranted in this case by section 1847 of the Code of Civil Procedure, where the language of the court may be found. There was evidence tending to repel the presumption that certain witnesses spoke the truth, and also affecting their character for truth, honesty or integrity. The cases cited do not apply. The instruction as a whole was also within the provisions of section 2061.

8. Specification 72 claims error in giving defendant's instruction No. 5, because the answer admitted the collision, and

admitted that defendant had agreed to carry plaintiff, and the instruction deprived plaintiff of these admissions by telling the jury that the burden of proof was on plaintiff to prove all the material allegations of the complaint. The instruction was directed to the material issues, and not to the material allegations, of the complaint. There is no issue of fact where the allegation of the complaint is not controverted in the answer: Code Civ. Proc., sec. 590. Plaintiff could have had an instruction informing the jury as to what facts were admitted, but he did not ask it.

9. Defendant's instruction No. 7 is to the effect that if the jury find that the train was in imminent danger of colliding with another train, and such danger was not occasioned by the negligence of defendant or its servants, and that the engineer, to avoid such collision, properly applied the air-brakes, and thus caused a sudden stoppage of the train, and plaintiff was thereby, and not otherwise, injured, the jury should find for defendant. It is objected that the instruction is hypothetical and erroneous, within the rule in *Kellogg v. Clyne*, 54 Fed. 696, 4 C. C. A. 554; *Sturgis v. Kountz*, 165 Pa. 358, 27 L. R. A. 390, 30 Atl. 976, and in *Re Carpenter's Estate*, 94 Cal. 406, 29 Pac. 1101; that the leaving the switch open, and running through it, was negligence, and caused the violent application of the brake; that the instruction attempts to justify the accident, by attributing the injury to the sudden stoppage of the train by the use of the air brake, ignoring the negligence that made this necessary; that justification for accidents arising from negligence must be set up in the answer; that the mere happening of an accident to the train by which injury was inflicted raises a *prima facie* case of negligence, and the court had no right to assume that the jury might find that the collision was not occasioned by defendant's negligence, for there was no evidence introduced or pleading tending to show want of negligence. Instructions 8 and 9 are met by similar objections. We do not think the case requires us to pass upon the question, much discussed by appellate courts, to wit: When will the courts assume that a *prima facie* case of negligence has been made out? Appellant's position is that whenever a person enters the cars of a common carrier under contract to be transported to a certain point, and an injury happens to him through some accident to the train, these facts alone raise a *prima facie* case of

negligence against the carrier, and therefore the instruction was error here, because there was such prima facie case made out. The briefs of counsel on both sides are full of authorities dealing with this question. It seems to us, however, that the instruction does not involve its discussion. In this case the injury was denied in the pleadings, and strongly controverted by the evidence. A prima facie presumption of negligence did not arise upon the pleadings, nor until after plaintiff had testified that he was injured by the collision. The collision, under the circumstances in the case, and the injury being shown, the burden of disproving negligence was cast upon defendant. Plaintiff could rest upon this presumption, or he could introduce evidence of negligence, or he could do both. He chose to rely upon the presumption. Defendant introduced evidence which, it contended, overcame, and which the jury, we may presume, found did overcome, this presumption, and showed that the collision was unavoidable and without fault of defendant, and also that plaintiff was not injured thereby. The issue of negligence was one of fact before the jury. The court, therefore, could not, and did not, assume that negligence was admitted or proved or disproved. Plaintiff seems to claim that it was the duty of the court to treat negligence as admitted, because he had made a prima facie case of negligence. It was simply an issue of fact for the jury, under the evidence, to be treated as any other issue of fact. The instruction properly told the jury to find for the defendant if the collision was not occasioned by the negligence of defendant. The evidence tended to prove that the injury complained of was caused by the use of the air-brake, and not by the collision which followed. The court told the jury that if the air-brake was properly used to avoid the danger of a collision, which danger was not occasioned by the negligence of defendant, and plaintiff was injured by the sudden stoppage of the train through the application of the air-brake, and not otherwise, they should find for defendant. We cannot see that any rule of law was violated in thus instructing the jury. The jury was left to say whether or not the leaving the switch open was in itself negligence, or whether the defendant was at fault in leaving it open. The objection that the instruction related to facts in their nature a justification of defendant, and, no justification having been pleaded, the instruction was error, is without merit. The

evidence as to the injury being caused by the use of the air-brake was admissible under the general denial. Besides, no objection was made to its admission when offered, and defendant had a right to have it considered by the jury.

10. Instruction No. 9, given at request of defendant, is claimed to be outside any issue in the case. It reads: "If you believe from the evidence that the collision referred to by the witness happened by mere accident, without any fault on the part of defendant or its employees, then the plaintiff cannot recover in this action." We cannot perceive but that this instruction substantially, though briefly, stated what appears in more detail elsewhere in several instructions. There is no pretense by anyone that the collision was the result of design, or that it was not accidental. "Without any fault" was equivalent to saying "without negligence." There was certainly evidence tending to show that the collision was accidental.

11. Instructions given for defendant, 13 to 23, inclusive, relate in one way or another to the measure of plaintiff's recovery. It does not seem to us as necessary to notice the principles of law involved in these directions to the jury, inasmuch as we must assume that the jury found there was no injury or damage whatever for which defendant was liable. Conceding error in the law given by the court as to the measure of damage, it could not have prejudiced plaintiff, for the jury did not reach the question of plaintiff's actual damage.

12. Instruction 26, given at the request of defendant, is objected to, because not applicable to the case. It was that where weaker or less satisfactory evidence is offered, when it appears that stronger and more satisfactory evidence was within the power of the party and not offered, the evidence offered should be viewed with distrust. Appellant claims that this instruction was aimed at the plaintiff's evidence, but that in fact there is nothing in the transcript to show that in plaintiff's case there was anything to warrant it. I do not find any very glaring instance of substitution by plaintiff of weaker for more satisfactory evidence within his control; but as much cannot be said for defendant's evidence. Instructions, however, although asked by the respective parties, become, when given, the law as announced by the court, and may be and should be applied to the entire evidence. If

defendant asked for an instruction which in fact was prejudicial to and applied to its own, and did not apply to plaintiff's, evidence, we cannot see that it could injure plaintiff or be error.

13. Instruction 27, asked by defendant, and given, is objected to as singling out and naming two of plaintiff's witnesses, and saying to the jury of them that, if their statements as witnesses were found to be inconsistent with their statements made elsewhere, the jury were at liberty to determine to what extent that fact would tend to impeach their credibility or detract from the weight to be given their testimony. The objection is not to the law as stated, but to pointing out the particular witnesses by name. We do not think that such course is to be commended. The better and fairer practice is to leave the jury, aided by argument of counsel, to make the application. The danger is that, where the court designates certain witnesses by name, the jury may assume that these witnesses alone are to be regarded as within the rule, while there may be others fairly within it, or claimed to be within it. Juries, in doubtful cases, are often inclined to follow intimations given by the trial judge; and, as the jurors are the exclusive judges of the facts, the court should avoid invading this prerogative of the jury, either directly or by implication. In this case, however, we are pointed to no instances where the instruction might apply other than to the witnesses named; and we cannot say that the jury was misled by it, or that it worked injury to the plaintiff. On the whole case, we find no sufficient error to warrant a new trial, and therefore advise that the judgment and order be affirmed.

We concur: Haynes, C.; Belcher, C.

PER CURIAM.—For reasons given in the foregoing opinion the judgment and order are affirmed.

In re BRANNAN'S ESTATE.**S. F. No. 655; December 16, 1897.****51 Pac. 320.**

Executors—Petition to Sell Land.—Legatees presenting a verified petition for the sale of testator's land need not prove the allegations of the same, where they are not denied by answer.

Executors—Sale of Land—Evidence.—A Contention that certain allegations in a petition to sell a testator's land were not proved cannot be sustained where they were matters which appeared from the papers on file in the case, to which the attention of the court was called.

Executors—Sale of Land.—Where Testator's Land was Leased for a certain period, an executrix cannot object to a sale thereof before the expiration of the lease, to pay debts and legacies, on the ground that it would cause a loss of the rents, if they would not greatly exceed the interest on such debts and legacies.

Executors—Sale of Land.—An Objection That, on Account of the depreciated value of testator's property, a sale thereof would be to the damage of the residuary legatees, cannot be interposed against a petition for an order directing the executrix to sell, as the objection can be considered, under Code of Civil Procedure, section 1552 et seq., only when the sale comes up for confirmation.

Executors—Sale of Land Subject to Lease.—An executrix may be directed to sell testator's property, subject to an existing lease for a term of years, giving the lessee an option to purchase at the end of the term, where the lease does not prohibit a sale during the term.

APPEAL from Superior Court, City and County of San Francisco; James V. Coffey, Judge.

In the matter of the estate of Thomas J. Brannan, deceased, an order was made directing the executrix to sell certain lands, and she appeals. Affirmed.

E. N. Deuprey for appellant; E. J. Pringle for respondents.

BELCHER, C.—The court below made an order on April 24, 1896, authorizing and directing the executrix of the last will and testament of Thomas J. Brannan, deceased, to sell at public auction a certain described lot of land in the city of San Francisco, belonging to the estate of the deceased, for

the purpose of paying the debts and legacies of said deceased. From that order this appeal is prosecuted by the executrix.

It appears that Mary James, Margaret Brannan, John Brannan and William Brannan, legatees under the will of said decedent, presented a verified petition to the court below asking for a sale of the said lot. The petition stated all the facts required by section 1537 of the Code of Civil Procedure, and, among other things, that the will of the decedent was admitted to probate in said court on the thirtieth day of April, 1894, and on the same day letters testamentary were issued to the appellant, Johanna Manseau, as the executrix thereof; that notice to creditors was duly given, and the time for presenting claims against the estate had expired; that the inventory and appraisement of the estate was filed June 5, 1894, and the first annual account of the executrix was filed January 3, 1895, from which it appeared that the amount of personal property that had come into the hands of the executrix was \$4,269.81; that the second annual account of the executrix was filed in February, 1896, and the amount of personal property then remaining in her hands undisposed of was \$3,147.25; that the debts outstanding to be paid out of the estate amounted to \$792; that the debts, expenses and charges of administration, accrued and paid by the executrix, amounted to \$641.33; that the legacies given to the legatees, who were named, amounted to \$5,450, and that appellant was made residuary legatee; that decedent died seised of the said lot of land, and the same was rented under a term lease for five years, at the monthly rental of \$40, which lease would expire on the twenty-third day of March, 1899, with the privilege of purchase, at the expiration thereof, by the lessees for the sum of \$8,000; that the appraised value of said lot was \$5,000, and a sale of the same was necessary to pay the legacies and remaining expenses and charges of administration; that the decedent was an unmarried man, and since his death the estate had not acquired any interest in any other real property; that third parties had represented to petitioners that they were ready and willing to buy said real property at a price not disproportionate to its value, and to comply with and make their offers in accordance with the terms of sections 1549 and 1550 of the Code of Civil Procedure; and that said third parties had made known their said offers to the executrix, through her attorney, and she had refused

and neglected to apply for an order of sale of said property in accordance with the terms of section 1537 of said code. The answer of the executrix to the said petition denies that third parties had represented to the petitioners that they were willing to buy said real property at a price not disproportionate to its value, or otherwise to comply with or make their offers in accordance with the terms of sections 1549 and 1550 of the Code of Civil Procedure, and alleged that an offer of \$6,000 for said real estate had been communicated to her, and that, as executrix, she refused and neglected to accept the same, for the reason that the said property, as she was advised, was of the value of \$8,000; that, as stated in the petition, the property was under lease to and including the twenty-third day of March, 1899, at a monthly rental of \$40, with the privilege of purchase by the lessees for the sum of \$8,000, and to make a sale thereof at the present time would incur a direct loss to the estate of \$1,400 in rentals and \$2,000 in depreciation of value, or a total of \$3,400. The answer further alleged that she refused to accept any offer coming through the petitioners of an amount that would be so great a decrease of the value of the estate and unlawful waste thereof, and, furthermore, that, as executrix of the estate, she had no right or privilege to violate the terms of the lease then existing in regard to and concerning said real property. In due time, the application of petitioners came on regularly before the court for hearing, and was submitted for decision upon the petition and answer thereto and the other papers on file in the matter of said estate. No other evidence was offered by either party, and thereupon the court made the order appealed from, reciting therein that "the court having fully heard and examined the proofs, and it appearing to the satisfaction of the court upon such hearing that it is necessary that the real estate of said deceased, hereinafter described, be sold for the payment of the debts outstanding against said decedent, the expenses and charges of administration, and the legacies of the said will and testament of said deceased," etc.

The contention of appellant is that no proof was offered to sustain any of the allegations of the petition, and hence the court erred in making the order. The learned counsel then specifically enumerates nearly all the averments of the petition, and says that no proof was offered in support thereof.

The answer to this contention is that none of the averments referred to were denied by appellant, and they were therefore deemed admitted to be true, and no proof in support of them was required. Besides, they were matters which appeared from the papers on file in the case, and to which the attention of the court was called at the time of the submission.

That a sale of the property was necessary to pay the legacies, etc., was not denied; and it clearly appeared that a sale was then, or would be at some future time, necessary for that purpose.

The objection that the sale of the property at the time appointed would cause a loss to the estate of \$1,400 in rentals is without merit, as the court could readily see that the interest on the legacies and unpaid debts during a delay of thirty-five months would amount to nearly as much as the rentals. So, the objection that the sale, if made at the time appointed, would cause a loss to the estate and damage to the residuary legatee in the sum of \$2,000, by reason of the depreciated value of the property, was a matter to be considered only when a return of the sale should be made, and it should come up for confirmation: Code Civ. Proc., sec. 1552 et seq. So, too, the objection that the executrix had no right to violate the terms of the lease by a sale of the property before the lease expires finds no support in the record. It does not appear that there was any provision in the lease prohibiting a sale of the property during its term, or that the sale ordered was not to be made subject thereto. We find in the record no valid ground for reversal, and advise that the order appealed from be affirmed.

We concur: Chipman, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order appealed from is affirmed.

SILBERHORN CO. v. WHEATON et al.

S. F. No. 433; December 29, 1897.

51 Pac. 689.

Sale—Breach of Warranty.—The Damages Sustained where defendants purchased from plaintiff, under a contract of sale, subject to the warranties declared under Civil Code, sections 1768-1771, two carloads of hams, which proved unmerchantable, and which defendants were compelled to sell at reduced prices, would be, where the contract price was not all paid, the difference between the amount the hams should have sold for if up to the standard agreed upon and the price actually realized, less the balance due on the contract price, together with the cost of freight and smoking, which charges defendants were to pay.¹

Appeal.—Findings of the Trial Court, Unsupported by any evidence, are cause for reversal.²

APPEAL from Superior Court, City and County of San Francisco; Walter H. Levy, Judge.

Action by the Silberhorn Company against George H. Wheaton and others. From a judgment for defendants on their counterclaim plaintiff appeals. Reversed.

T. M. Osmont for appellant; Stanley, Hayes, McEnerney & Bradley for respondents.

PER CURIAM.—This action was brought to recover from defendants an alleged indebtedness of \$2,093.75 for a carload of twenty-five thousand pounds of sweet pickle hams, sold by plaintiff to defendant on March 5, 1890, and delivered to them at Sioux City, Iowa, on April 26, 1890. The defendants, by their answer, denied that the hams were delivered to them in

¹ Cited and approved in *Germain Fruit Co. v. J. K. Armsby Co.*, 153 Cal. 590, 96 Pac. 321, a case of sale by sample. The court said: "The same rule has been applied in this state in case of an implied warranty, under section 1771 of the Civil Code, that merchandise inaccessible to the examination of the buyer is warranted to be merchantable."

² Cited and followed in *Stoffelo v. Molina*, 8 Ariz. 214, 71 Pac. 913, as authority for a ruling that to enable the appellate court to affirm a judgment of the lower court in favor of the plaintiff, the record must disclose some positive affirmative evidence in support thereof.

accordance with the contract of sale, and denied that any sum whatever remained due or owing from them to the plaintiff. They then, as a defense, and by way of counterclaim for damages, set up facts showing that the hams sued for, and also another carload of similar hams, were sold and delivered to defendants, subject to the warranties declared in sections 1768, 1769, 1770 and 1771 of the Civil Code, and that the said hams as delivered were not sound and merchantable, or as nearly so, at the place of delivery, as could have been secured by reasonable care, and were not free from latent defects, not disclosed to the buyers, arising from the process of manufacture, but were in fact unsound and unmerchantable, and such defects were latent, and not disclosed to or discovered or known by defendants until after all said hams had been smoked by them, and many of them sold and disposed of in the ordinary course of their business, and those sold had been returned to and taken back by them; wherefore defendants asked judgment against the plaintiff for the sum of \$3,954.92. Defendants also filed a cross-complaint, setting forth facts as to the said two carlots of hams, and claiming that by reason of the defects in the hams they had suffered damage, loss and injury to their trade and business in a large sum of money, for which they asked judgment against the plaintiff. The case was tried by the court, without a jury, and the findings upon all the issues presented were very full; and as conclusions of law the court found: "(1) That the plaintiff is not entitled to take anything under its complaint; (2) that the defendants are not entitled to take anything under their cross-complaint; (3) that the defendants are entitled, under their answer and counterclaim, to have and recover a judgment against the plaintiff for the sum of \$1,666.24, made up as follows," etc. Judgment was accordingly so entered, and from an order denying its motion for a new trial the plaintiff appeals.

It is shown by the evidence that two carloads of hams were purchased by defendants from plaintiff, under the warranties before mentioned. The contract price of car No. 5 was \$2,093.75, and of car No. 6, \$2,156.25. By reason of imperfect or "short" curing—a latent defect—the hams were not up to the contract standard. The hams were delivered free on board the cars at Sioux City, Iowa. Before marketing them in California, it was necessary for defendants to pay

freightage, drayage and the cost of smoking. The evidence of defendants' bookkeeper seems to have been accepted by the court, and is to the following effect: If the hams of car No. 5 had been up to standard, they would have sold for \$3,014.54. From this sum, after deducting the contract price and the cost of preparing the hams for the market, the remainder would represent defendants' profit in the transaction. Not being wholesome hams, the amount realized was only \$2,106.23. The hams of car 6, if wholesome, would have sold for \$3,196.22, this sum also including defendants' profit. Not being wholesome, they brought only \$1,112.84. From these figures it clearly appears that the difference between what should have been realized upon the sale of the hams and what actually was realized is \$2,991.69. If defendants then had paid the full contract price for the hams, and all expenditures properly chargeable to them, this sum would represent their damage. But it is undisputed that the contract price of car 5, namely, \$2,093.75, had not been paid by defendants, and that plaintiffs had advanced on behalf of defendants the sum of \$446.55 freightage upon one of the carloads, which freightage was an expenditure properly to be borne by defendants. Therefore from the sum of \$2,991.69 are to be deducted \$2,093.75 and \$446.55. The remainder (\$451.39), under the evidence of defendants' bookkeeper, would represent defendants' net damage, and the amount, therefore, for which they should have received judgment.

Were the findings of the court in a condition to warrant it, the judgment might be ordered modified to this extent, but, under the record here presented, this cannot be done. At the conclusion of the trial, defendants obtained leave of court to amend their pleading to conform to the evidence. They did amend; the court accepted the amendments; and its findings are in strict accordance with them. But by these amendments and these findings it is declared that the value of the hams at Sioux City, Iowa, at the time and place of delivery, had they been as warranted, would have been, car 5, \$3,014.54; car 6, \$3,196.22. There is no evidence whatsoever supporting these findings. It is nowhere contended that the value of the hams at Sioux City, at the time and place of delivery, had they been up to warranty, would have exceeded the contract price. The pleader and the court seem both to have been misled, and to have misunderstood the testimony

of defendants' bookkeeper. By that testimony, as has before been pointed out, had the hams been up to standard, they would have sold in San Francisco after smoking, with a profit to defendants, for the sums indicated. The finding made by the court can mean but one thing—that defendants had made a profitable bargain, and had purchased hams to be delivered at Sioux City, Iowa, of a certain grade, for a total sum of \$4,250, which hams, if delivered up to standard, free on board the cars at Sioux City, Iowa, would have been of the value of \$6,210.76. There is no evidence whatsoever in the record to support these findings, and it is not asserted that there is any such. As it is beyond the province of this court to make findings, the cause must therefore be reversed for a new trial; and, since it must be so reversed, the regularity or irregularity in allowing the proposed amendments of defendants need not be considered, it having already been pointed out that they did not conform to any evidence introduced upon the trial. The order denying plaintiff's motion for a new trial is therefore reversed and the cause remanded.

SMITH v. FERRIES & C. H. RY. CO. et al.*

No. 15,962; December 28, 1897.

51 Pac. 710.

Appeal—Divided Court.—Where One Justice of the supreme court is disqualified, and the six remaining are equally divided in opinion, the judgment will be affirmed.

Corporation—Purchase of Railway.—A Stockholder of a corporation, which purchased a street railroad of another corporation and agreed to assume bonds issued by it, cannot raise the question of fraud in constructing the road, or attack the validity of the bonds.

Corporation—Stockholder's Suit—Parties.—Where a Corporation Purchased all the property of another corporation, including a street railway, and all the property it might acquire, and all its rights, except its right to be a corporation, and assumed certain bonds that it had issued, the latter corporation is a necessary party defendant, where a stockholder of the former attacks the validity of the bonds, and charges that the railway was fraudulently constructed.

Corporation—Assumption of Bonds.—It is not Ultra Vires for a corporation to assume the payment of bonds that were issued by

*Rehearing denied.

another corporation in violation of Civil Code, section 309, prohibiting the contraction of debts beyond the subscribed capital stock.

Corporation—Limitation on Indebtedness.—A Corporation Which, in Payment for property, assumes the payment of bonds issued by another corporation, cannot retain the property, and claim the bonds were invalid, as being overissued, in violation of Civil Code, section 309, prohibiting the contraction of debts beyond the subscribed capital stock.

Corporation—Original Bonded Indebtedness.—Prior to the Statute of 1889, directors of a corporation had power to create an original bonded indebtedness.

Corporation—Bonds—Notice of Meeting.—A stockholder claiming that bonds issued by the directors were void, because issued without notice to the stockholders, must allege that the stockholders did not consent to the meeting at which the indebtedness was created, as Civil Code, section 317, provides that such consent abrogates the necessity of notice.

Corporation—Limitation on Indebtedness.—Bonds of a Corporation issued in violation of Civil Code, section 309, prohibiting the contraction of debts beyond the subscribed capital stock, are not void.

Corporation—Bonds.—The Decision of the Supreme Court that bonds of a corporation, issued in violation of Civil Code, section 309, are not void, is a declaration of a rule of property, and will not be overruled.

Corporation—Limitation on Indebtedness.—Shares of Stock Delivered by a corporation to the stockholders of another corporation, as a part of the price of property purchased from it, are part of the former corporation's capital stock, within Civil Code, section 309, prohibiting the creation of debts by a corporation beyond its "subscribed capital stock."¹

Corporation—Fictitious Stock.—Complainant Alleged That a corporation purchased property of another corporation worth at least \$1,200,000, and as the price assumed an indebtedness of \$1,050,000, and issued to the latter corporation's stockholders twenty-four thousand seven hundred and fifty shares of stock, of the par value of \$2,475,000. He did not allege that the former corporation had any property before such purchase. Held, that there was no fictitious issue of stock, within constitution, article 12, section 11, providing that all "fictitious" issues of stock shall be void.²

¹ Cited in *Smith v. Martin*, 135 Cal. 250, 67 Pac. 780, as a valuable element in the history of that case by reason of the published opinions, although, having gone off on an equal division of the court, it is without authority as precedent.

² Cited and approved in *Turner v. Markham*, 155 Cal. 571, 102 Pac. 275, where, speaking of a corporation owning no property, (wherefore its stock was without value), the court says: "It was

Corporation.—A Dissatisfied Stockholder Alleged That the Directors, in pursuance of a fraudulent scheme, had created a bonded indebtedness in excess of the capital stock, and had purchased certain property of another corporation, of which they were also directors, and in payment therefor had issued stock to its stockholders, and had assumed the payment of illegal bonds. Held, he was entitled to no relief that could not be granted to the corporation itself.

Corporation.—A Stockholder Alleged That the Directors Purchased property of another corporation worth at least \$1,200,000, and in payment therefor issued shares of stock of the par value of \$2,475,000, and assumed an indebtedness of \$1,050,000. He did not allege that the corporation owned any property before such purchase. Held, he did not show that he was injured.

Corporation.—Fictitious Stock.—Where Directors of a Corporation Purchased of another corporation, of which they were the stockholders, property of the value of \$1,200,000, and in payment therefor issued to themselves 24,750 shares of stock, of the par value of \$2,475,000, and assumed an indebtedness of \$1,050,000, a stockholder of the former corporation is not entitled to have such issue of stock declared void and fictitious, without setting aside the whole transaction.

Corporation.—Overissue of Bonds.—Where a Stockholder of a corporation alleges that its bonds were invalid, as being an overissue, it will be presumed the bonds are in the hands of bona fide holders, in the absence of allegations to the contrary.

Corporation.—Bonds.—The Allegation of a Stockholder, Assailing the issue of bonds by the directors, "that six per cent bonds, legally issued and properly secured, were worth much more than the

perfectly legal and proper for all the parties in interest in such a corporation to do as here they agreed to do—sell all or any part of the stock of the corporation in return for mining claims, or for anything else of value."

Cited, with other cases, in *Garretson v. Pacific Crude Oil Co.*, 146 Cal. 188, 79 Pac. 840, in support of the proposition: "Acting in good faith, it was competent for all the stockholders to agree by unanimous concurrence that shares of the corporation should be issued to themselves in exchange for property conveyed by them to the corporation and to acquire which the corporation was formed."

Cited with approval by Ross, J., dissenting, in *Holt v. California Development Co.*, 161 Fed. 15, 88 C. C. A. 167, where the sufficiency of the bill was being considered in an application by a stockholder to have a receiver appointed and contracts of the corporation annulled. Said the dissenting judge: "The appellant sued as a dissatisfied stockholder of the California Development Company, and as such only. Manifestly, then, he can have no other or greater right to maintain the suit than would that corporation, were it the complainant."

face value, to wit, fifteen per cent more in the market," is not an allegation that the six per cent bonds issued by the corporation were worth fifteen per cent premium.

Corporation.—A Stockholder's Allegation That Certain Directors furnished labor and material for the corporation, and charged large profits against it, "with the consent and connivance of" the other directors, is not sufficient to show liability of the latter directors.¹

Corporation.—An Allegation That a Corporation's Stockholder "is informed and believes" that certain directors furnished labor and material for the corporation, and charged large profits against it, and that no accounting had been made, is insufficient on demurrer.

Corporation.—A Purchase by a Corporation of All the Property of Another corporation is not void merely because the boards of directors of both corporations were the same.

Corporation—Stockholder's Suit.—A Transaction by Directors that is voidable only will not be set aside at the instance of the stockholder, unless he shows that he sustained damage.

Pleading—Sustaining Demurrer Without Leave to Amend.—A complainant cannot, on appeal, first complain of error in sustaining a demurrer without leave to amend.

Pleading—Amendment—Refusal.—It is not an abuse of discretion to refuse leave to amend a fourth amended complaint.

APPEAL from Superior Court, City and County of San Francisco; Charles W. Slack, Judge.

Bill by J. Howard Smith against the Ferries and Cliff House Railway Company and others. Judgment for defendants and plaintiff appeals. Affirmed.

J. Howard Smith in pro. per.; E. F. Preston, Pillsbury & Hayne and Page, Eels & Wheeler for respondents.

PER CURIAM.—In this cause Justice Harrison is disqualified; and of the other members of the court Justices Garoutte, Van Fleet and McFarland are of the opinion that the judgment should be affirmed, and the Chief Justice and Justices Temple and Henshaw are of the opinion that the judgment should be reversed. The cause has been pending a long time, and repeated consultations have demonstrated that the said differences among the justices are permanent. For this reason, and upon the principle announced in Santa

¹ Mentioned in *Copsey v. Sacramento Bank*, 133 Cal. 662, 85 Am. St. Rep. 238, 66 Pac. 8, as citing many cases to the point that "it is well settled that a director may deal with his corporation."

Rosa City R. R. v. Central St. Ry. Co., 112 Cal. 436, 44 Pac. 733, *Frankel v. Deidesheimer*, 93 Cal. 73, 28 Pac. 794, and *Luco v. De Toro*, 88 Cal. 26, 11 L. R. A. 543, 25 Pac. 983, it is ordered by the court that the judgment herein appealed from be, and the same is hereby, affirmed.

The views of the several justices are expressed in the following opinions:

Opinion of affirmance by GAROUTTE, J.:

Plaintiff, as a dissatisfied stockholder of the Ferries and Cliff House Railway Company, a corporation, has brought this action against the corporation, Thomas Brown and J. R. Jarboe, who it is alleged are the trustees of the holders of the bonds of the corporation, and the five other gentlemen named as defendants, who are alleged to be the directors of the corporation defendant. A demurrer was sustained to the fourth amended complaint, and an appeal is brought to this court for the single purpose of testing the legal sufficiency of that pleading. The action is essentially one in equity, and the complaint by its allegations deals with the affairs and transactions of three corporations, namely, the defendant corporation, the Powell Street Railway Company and the Park and Cliff House Railway Company.

The Powell Street Railway Company was organized December 9, 1886, and the five defendants in this case, who are alleged to be the directors of the defendant corporation, organized that corporation, and constructed and equipped the road. As to the manner the stock of this corporation was manipulated and held the complaint alleges: "Defendants Martin, Ballard, Magee, Adams and Lynch subscribed in writing for barely a sufficient number of shares of the capital stock of each of said corporations as would entitle them, under the statute, to incorporate each of said companies, and no more. In the Powell Street Railway Company said defendants subscribed for forty shares each, and said subscription list was thereupon closed, and thereafter all of said defendants duly became stockholders in said corporation to the extent of forty shares each; and that, except the aggregate subscription of two hundred shares, of the par value of \$20,000, made by said defendants, directors, no other shares of the capital stock of said corporation were ever subscribed for or paid for by any other person, association or corpora-

tion. Upon September 12, 1887, bonds of the Powell Street Railway Company to the amount of \$700,000 were issued to Martin and Ballard, two of the directors, in payment of the construction of the road, and said bonds were secured by a deed of trust of the corporate property to defendants Brown and Jarboe."

The Park and Cliff House Railway Company was organized October 13, 1887, by these same defendant directors, and the same allegations generally are found in the complaint with reference to this corporation as are stated regarding the Powell Street Railway Company, except that the amount of bonds issued by said corporation was \$350,000, and it was further alleged: "In Park and Cliff House Railway Company said defendants subscribed for twenty shares each, and said subscription list was thereupon closed, and thereafter all of said defendants duly became stockholders in said corporation to the extent of said twenty shares each; and that, except said aggregate subscription of one hundred shares of the par value of \$10,000, made by said defendant directors, no other shares of the capital stock of said corporation were ever subscribed for or paid for by any other person, association, or corporation."

At a subsequent date the defendant corporation was organized by the same five gentlemen, and the allegations pertaining thereto, in effect, are the same as those we have already stated pertaining to the other corporations. We also find this allegation: "In Ferries and Cliff House Railway Company said defendant directors subscribed for fifty shares each, and said subscription list was thereupon closed, and thereafter all of said defendant directors duly became stockholders in said corporation to the extent of said fifty shares each; and that, except said aggregate subscription of two hundred and fifty shares, of the par value of \$25,000, made by said defendant directors, no other shares of the capital stock of said corporation were ever subscribed for or paid for by any other person, association or corporation, and that the remainder of said capital stock of said corporation was never sold to or bought and paid for (either in whole or in part) by any other person, association or corporation; that the same remained, continued to be, and still is the property of said corporation." It is further alleged that the proposed capital stock of each of these aforesaid corporations was divided

as follows: Powell Street Railway Company, \$2,000,000—twenty thousand shares, of the par value of \$100; Park and Cliff House Railway Company, \$500,000—five thousand shares, par value \$100; Ferries and Cliff House Railway Company, \$2,500,000—twenty-five thousand shares, par value \$100. We then have the following important allegation: “That in pursuance of said fraudulent scheme defendants Martin, Ballard, Adams, Magee and Lynch, with the consent of said Jarboe and Brown and the stockholders of said corporations, on the thirtieth day of December, 1887, caused the Powell Street Railway Company, and on the fifth day of March, 1888, caused and procured said Park and Cliff House Railway Company, for valuable considerations, and by good and sufficient conveyances and assignments, to convey, assign, transfer and set over to defendant Ferries and Cliff House Railway Company all the property, real and personal, then owned or that might subsequently be acquired by both or either of said Powell Street Railway Company or Park and Cliff House Railway Company, together with all rights, interests and franchises, vested and contingent, of each or either of said corporations (except their right to be and remain a corporation).” It further appears that the consideration for this transfer was a guaranty and assumption by defendant corporation of all the bonded indebtedness and other liabilities outstanding against the vendor corporations, and also the issuance by the defendant corporation of all its unsubscribed capital stock, to wit, twenty-four thousand seven hundred and fifty shares, to the stockholders of the said two corporations, in certain proportions. It is further alleged that upon February 13, 1889, the defendant corporation created a bonded indebtedness of \$650,000, and that a trust deed of its property was given to Brown and Jarboe to secure the bondholders. It is also alleged that the net earnings of the defendant corporation have been \$400,000, and that this money has been expended in paying interest upon the bonded indebtedness either created or assumed by the defendant corporation. It is also alleged that such application of the earnings was unauthorized in law, for the reason that all of these bonds, with the exception of a very limited amount, were in excess of the subscribed capital stock of the several corporations and void.

Plaintiff, by his prayer for relief, asks the court, among other things: (1) To quiet the title of the defendant corporation to all the property received by the transfer from the Powell Street Railway Company and the Park and Cliff House Railway Company. (2) To declare that no portion of the capital stock of any one of said corporations was ever subscribed for, or lawfully issued, except as follows, to wit: Two hundred shares, of the par value of \$20,000, in the Powell Street Railway Company; one hundred shares, of the par value of \$10,000, in the Park and Cliff House Railway; two hundred and fifty shares, of the par value of \$25,000, in the Ferries and Cliff House Railway Company. (3) To declare that the transfer to these five defendants, as stockholders of the first two corporations organized, of the twenty-four thousand seven hundred and fifty shares of the capital stock of the defendant corporation, is fraudulent, inoperative and void. (4) To declare that the agreement entered into on the twenty-ninth day of December, 1887, wherein the defendant corporation assumed certain liabilities and bonded indebtedness of the other two corporations, was at the time of said guaranty and indorsement an unlawful creation of bonded indebtedness by said defendant corporation, as being in excess of \$20,000, the subscribed capital stock of the Powell Street Railway Company, and that agreement be declared void, in so far as it attempts to hold the defendant corporation to a greater liability thereon than the aforesaid sum of \$20,000; and the same relief is asked as to the Park and Cliff House Railway Company as to its indebtedness over and above the sum of \$5,000, the amount of its subscribed capital stock. (5) That it be declared that the \$650,000 of the bonded indebtedness created by the defendant corporation be declared an unlawful increase of its bonded indebtedness, as being in excess of its subscribed capital stock, and also that said indebtedness was an increase of its liabilities without the consent of its stockholders first had and obtained. (6) That said defendant directors account for all moneys received in their capacity as directors of the defendant corporation.

The foregoing facts comprise a somewhat meager statement of the allegations of a very voluminous bill in equity, and other allegations thereof will be noticed as we meet them in the consideration of the various questions involved in this litigation.

Plaintiff charges fraud in the construction of the Powell Street and Park and Cliff House roads, and also alleges that the amount of bonds issued by these two corporations was in excess of their respective subscribed capital stock, and that such bonds were void to the extent of that excess. We fail to see how these matters are involved in the present litigation. The plaintiff never was a stockholder in either of these corporations, and we think it is none of his affairs as to the conduct and management of their business. He is not in a position to raise a question of fraud in the construction of the roads, or to attack the validity of the bonds, as having been issued without warrant of law. Again, neither of these corporations is made a party defendant, and without their presence the court will not investigate their acts and adjudicate upon their property rights. The only shadow of ground upon which he seems to rely to give him a status as a litigant in this regard is the fact that the defendant corporation assumed the payment of these bonds; and he now declares the bonds void as being an overissue, and, being void, the net profit of the defendant corporation should not be applied to the payment of interest accruing upon them. The position of plaintiff is untenable. As suggested, the proper parties are not before the court in order to litigate the validity of those bonds. Again, conceding the bonds unlawfully issued, for the reason stated, that fact does not nullify the assumption of their payment by the defendant corporation. There is no condition in the contract entered into between these corporations, either expressed in the writing, or to be inferred from the law, that the assumption or the guaranty of this indebtedness was only to be binding as against the defendant corporation in case the bonds were in all respects regularly and legally issued. Neither is it necessary that the bonds should be regularly and legally issued in order that the defendant might bind itself in law to pay them as they matured. It is no more true than that the performance of any contract merely *ultra vires* might not be guaranteed by a third party. It is the law of this state that a corporation, for a valuable consideration, may guarantee or assume the debt of another corporation: *Low v. Railroad Co.*, 52 Cal. 53, 28 Am. Rep. 629. Again, the assumption of this liability was based upon valuable considerations passing from the other two cor-

porations to the defendant corporation, and while retaining those considerations (and it expressly seeks to retain them by this pleading) it has no right to say: "The liability is not a valid one against the corporations creating it, and therefore not valid against me, and I will not pay it." By reason of the foregoing views, we dismiss from further consideration any question as to the validity of the bonds which formed a part of the consideration for the transfer to the defendant corporation of the various properties, rights and franchises of the Powell Street Railway Company and the Park and Cliff House Railway Company, and also as to any question as to charges of fraud pertaining to the construction of the roads of these two aforesaid corporations.

As we have seen, the defendant corporation assumed the payment of \$1,050,000 of bonded indebtedness at the time it entered into the contract with the other two corporations. Thereafter it created a bonded indebtedness of its own amounting to \$650,000, and it is insisted that, as against it, such assumed indebtedness and its own individual indebtedness are both void, as being in excess of its subscribed capital stock, the allegations of the bill being that its subscribed capital stock is \$25,000. It is further claimed that the \$650,000 indebtedness is void as having been created without notice to the stockholders. The creation of the defendant corporation's bonded indebtedness is alleged to have taken place February 13, 1889, and at that time we find no law upon the statute books forbidding the directors from creating a bonded indebtedness. The law as it then stood prohibited the directors from increasing a bonded indebtedness, and required a meeting of the stockholders to be held upon due notice to accomplish that purpose. But the creation of an original bonded indebtedness appears to have been a matter within the will of the board of directors, as coming within their general powers as such officers; and it was only by the statute of 1889, which took effect after this indebtedness was created, that such power was taken from the board of directors and given to the stockholders. But there is another reason which proves the weakness of the pleading. It is for the plaintiff affirmatively to state the facts which necessarily show this issue of bonds to be void, and it is not necessary that stockholders should have been notified as prescribed by the law in order that a bonded indebtedness might be created

at such meeting. Section 317 of the Civil Code provides: "When all the stockholders or members of a corporation are present at any meeting, however called or notified, and sign a written consent thereto on the records of such meeting, the doings of such meeting are as valid as if had at a meeting legally called and noticed." Those conditions may have been present at this meeting, and it was for the pleader to allege that such was not the fact; for, if such were the fact, the failure to give legal notice was wholly immaterial.

Was the \$650,000 issue of bonds void, as being in excess of the subscribed capital stock of the defendant corporation? Plaintiff's contention to this effect is maintained upon the ground that such issue was violative of section 309 of the Civil Code, wherein it is said the directors of corporations must not create debts beyond their subscribed capital stock. In the very recent case of *Underhill v. Improvement Co.*, 93 Cal. 300, 28 Pac. 1094, this identical provision of section 309 was under consideration, and it was there held, upon what we believe to be sound and convincing reasons, that a violation of this provision of the law by the board of directors did not have the effect of rendering the indebtedness created by its act void. And, unless the statute plainly and unequivocally declared that such would be the penalty visited upon creditors dealing with the directors of the corporation under those conditions, we would be loth to so hold, even if the question were one of the first impression; for the exact outstanding indebtedness of a corporation is often little less difficult to ascertain than that of a private individual. But, in addition to these considerations, the decision in that case has declared a rule of property, bonds have been bought and sold upon the faith of it, the business world has dealt and contracted in reliance upon the law as there declared, and for these reasons alone the interpretation of that provision of the statute as there given must stand until the legislature sees fit to otherwise enact.

The views we have heretofore expressed would seem to fully dispose of plaintiff's claim of the invalidity of the defendant corporation's bonds; but, owing to other questions arising in the case, and the bearings which the status of these bonds has in the consideration of those matters, we will further pursue our investigation as to the validity of this \$650,000 issue of bonds. Section 309 of the Civil Code declares the

directors must create no debts beyond their subscribed capital stock. Let us assume the showing to be true that the bonded indebtedness of the defendant corporation, including this issue of bonds, was \$1,700,000; did such indebtedness exceed the subscribed capital stock of the defendant corporation? Under these conditions the important question directly presents itself: What is meant by the term "subscribed capital stock," as used in the statute? The allegation of the bill is that the subscribed capital stock of the defendant corporation was \$25,000. At the date of the issue of the defendant corporation's bonded indebtedness of \$650,000 the corporation was then indebted in the sum of \$1,050,000 of assumed indebtedness, and the status of its stock was as follows: Two hundred and fifty shares, of the value of \$25,000, had been originally subscribed, and, of course, was "subscribed capital stock" in the strict and technical sense of the phrase. The balance of the stock, to wit, twenty-four thousand seven hundred and fifty shares, of the par value of \$2,475,000, had been issued some months prior to that time, and turned over to the stockholders of the Powell Street Railway Company and the Park and Cliff House Railway Company as part of the consideration for the properties of various kinds transferred by them to the defendant corporation. Under the facts of the aforesaid transaction, we are firmly convinced that this twenty-four thousand seven hundred and fifty shares of stock was subscribed capital stock, within the meaning of section 309. We think that any stock issued for a valuable consideration, at least for any of those valuable considerations named in section 359 of the Civil Code, is "subscribed capital stock," as the phrase is used in this chapter of the code. Such has been the construction inferentially placed upon this provision of the law ever since its creation. To our knowledge, it has never been assailed or doubted. That such was the intention of the law-making power is apparent when we consider section 322, as to the stockholder's liability to the creditors of the corporation. In that section it is provided: "Each stockholder of a corporation is individually . . . liable for such portions of its debts and liabilities as the amount of stock or shares owned by him bears to the whole subscribed capital stock . . . of the corporation, and for a like proportion only of each debt or claim against the corporation." If plaintiff's

contention be sound, then under this provision he, owning one hundred shares of the subscribed capital stock, and there being but two hundred and fifty shares in all of subscribed capital stock, would be liable for two-fifths of this debt of \$1,700,000, if it was sought to recover it from the stockholders. If such conditions should ever present themselves, we venture to believe that plaintiff's views of the law would undergo a radical change, and that he would earnestly insist upon the holders of the twenty-four thousand seven hundred and fifty shares paying their proportion of this vast indebtedness. It is too plain for argument that the holders of the twenty-four thousand seven hundred and fifty shares (if the transfer was not fictitious), wherever they may be, and whoever they may be, would be liable for their respective proportions of this indebtedness; and, if liable as stockholders, then certainly their own stock must be held to form a part of the great whole that section 309 terms the "subscribed capital stock," and which great whole forms the amount which is absolutely necessary to be determined before any stockholder's personal liability can be fixed.

Section 331 of the Civil Code provides for the levying of an assessment upon the subscribed capital stock for certain purposes. In *Stockton etc. Agricultural Works v. Houser*, 109 Cal. 1, 41 Pac. 809, a case was presented where the corporation directly issued to the defendant four hundred shares of its stock in consideration of the transfer to it of a certain factory, plant, etc. In that case the corporation treated these four hundred shares as subscribed capital stock not fully paid up, and brought an action, under section 331, to recover an assessment levied thereon. This court held that the action could be maintained and a recovery had. In one of the briefs filed in the interest of this appellant, it is conceded that stock issued by the corporation in consideration of coin in the hand would be subscribed capital stock. Such concession admits too much for plaintiff's cause, for the statute itself (section 359) provides: "No corporation shall issue stock or bonds except for money paid, labor done or property actually received, and all fictitious increase of stock or indebtedness is void." It will thus be observed that coin paid in hand for issued stock makes that stock no different and no more valuable than though it was issued for labor

done, or issued in exchange for property received, as in the case just cited.

To make sure what is already certain, we add another consideration for the conclusion we have reached. Section 322 contemplates that a creditor may recover his claim in full from the stockholders. It would seem that their insolvency only could defeat such recovery. Every stockholder is liable for a certain proportion of the creditor's debt, and the sum of the liabilities of all the stockholders is equal to the creditor's claim, but their respective liabilities are proportionate to the subscribed capital stock. Hence all the stock held by all the stockholders must be equal to the subscribed capital stock. Of course stock subscribed, and not yet issued, bears its proportion of a creditor's debt.

The value of the property received by the defendant corporation, as shown by the bill, was at least \$1,200,000. Deducting the assumed indebtedness of \$1,050,000, we then find the consideration for this issue of twenty-four thousand seven hundred and fifty shares was property of the value of \$150,000; and, when we consider that the plaintiff fails to show that the defendant corporation owned a dollar's worth of property at the date of this transaction with the other two corporations, we are not prepared to say but that full cash value was paid for this issue of stock, and upon this state of facts, as against the pleader, we will assume such to be the fact. Under no circumstances would we be justified in declaring the issue fictitious and void. In considering the meaning of the word "fictitious," as used in this connection, this court said in *Stein v. Howard*, 65 Cal. 616, 4 Pac. 662: "It may very properly be said that the use of the word 'fictitious' in the constitution, as above quoted, was as in contrast with the preceding sentence—as if to say that stock issued for money paid, labor done, or property actually received (price not named) is not fictitious." For the foregoing reasons we conclude that the "subscribed capital stock" of the defendant corporation, at the time its issue of bonds was made, was \$2,500,000, and it follows therefrom that such issue did not create a debt in excess of its subscribed capital stock.

The plaintiff in bringing this action as a dissatisfied stockholder stands in the shoes of the defendant corporation. His wrongs are the corporation's wrongs. He can have no other. He is acting for the corporation, and is a mere nominal plain-

tiff. The corporation is the real party in interest, and any judgment recovered inures to its benefit to the full extent, as if it were the plaintiff in name, and was actively prosecuting this litigation. These things being true, plaintiff has no more right in this litigation, nor is he allowed to do anything, or urge any grounds for relief, which would not be equally potent in a court of equity if the corporation itself was seeking redress for the same real or imaginary wrongs. Keeping these things in view, let us examine the transaction of 1888, wherein the deal was consummated of transferring all the property rights of the Powell Street Railway Company and the Park and Cliff House Railway Company to the defendant corporation, in return for an assumption upon its part of an indebtedness of \$1,050,000, and an issue and delivery by it of twenty-four thousand seven hundred and fifty shares of its stock in certain proportions to the stockholders of these two corporations. Conceding plaintiff to be so situated as to have a standing in this litigation which entitles him to assail this transaction, let us consider of what fraudulent acts does he complain, how has he been injured, and what relief does he seek? It is charged that the issue of stock made at this time by the defendant corporation was void and fictitious, as having been made without consideration; but we have already seen that such was not the fact, and that it passed for a very valuable consideration. It is also charged that the five defendant corporation directors converted this issue of stock to their own use. Well, if it was their stock, if the issue and transfer of it to them, as stockholders of the two vendor corporations, was a valid issue and a valid transfer, it was their property, to do with as they pleased, and it was not for this plaintiff, or anyone else, to complain of any disposition of it that to them seemed fit and proper. It is alleged that they sold portions of this stock, and converted the proceeds to their own use. If it was their stock, they had the undoubted right to convert the proceeds. It is also said the transaction was void because the defendant corporation thereby assumed an indebtedness in excess of its subscribed capital stock, but this contention we have shown possesses no merit.

Again, how was plaintiff injured by this transaction? How was his corporation injured? What injury does he allege? Absolutely none. If no such deal had taken place, there

never would have been \$400,000 of net earnings to law about. There is no allegation in the voluminous bill that this defendant corporation owned a dollar's worth of property at the date of this transaction, and we assume that it did not. Prior to that time what was its stock worth, if it owned no property? What is the actual cash value of a share of stock of a corporation that owns no property, and is without even a prospect of ever owning any? And such was the situation of this defendant corporation when this deal was perfected. The plaintiff shows in his pleading that by this contract the defendant corporation made a profit of \$150,000, for it received \$1,200,000 worth of property by the assumption of a debt of \$1,050,000, and, consequently, must have received for its issue of stock, which was practically valueless at that time, the above sum of \$150,000. Assuming the plaintiff to have been a stockholder prior to the time when this transaction was consummated, was his stock more valuable before or after? By any mathematical computation possible, the value of his stock was increased six dollars per share. Again, if plaintiff purchased his stock prior to this transaction, as he insists, the corporation owning no property whatever, not even a franchise, it was nothing but a shell, and we are justified in assuming that he paid less for his stock than he did these five defendants for the twenty-four thousand seven hundred and fifty shares. Upon the showing made by the bill, no injury resulted to the defendant corporation from the transaction, and the practice of a few such wrongs would have made the plaintiff a millionaire.

There is no principle of equity which would allow this plaintiff to attack that transaction. He does not propose to do the fair thing. He asks the court directly by the prayer of his bill to give him all the benefits which his corporation secured by the trade, and to relieve him from every burden assumed. He wants to retain all the property received from the other two corporations, and at the same time have the defendant corporation's issue of stock and its assumption of the bonded indebtedness both declared void. If the corporation was here as plaintiff asking such relief, it would present a spectacle not pleasant to the eyes of a court of equity; and yet a corporation has no heart and no soul, and therefore may not always appreciate what is exact justice between man and man. It surely follows that this sight is

no more pleasant for equity to behold when presented by a living, breathing plaintiff. At this point another reason at once presents itself why the issue of stock by the defendant corporation should not be declared void and fictitious. It was issued in pursuance of a contract, as part of an immense business transaction, and as part of the consideration for the transfer of vast property interests. That transaction is one and inseparable. It must stand or fall altogether. And that issue of stock cannot be set aside and canceled unless the whole transaction is set aside and canceled. The burdens and benefits are inseparably connected. To hold otherwise would sanction injustice and dishonesty, and no court will be found to so declare.

Is the plaintiff entitled to an accounting as to the \$650,000 issue of bonds and the \$400,000 net profits earned? It is alleged that these net earnings have been applied to the payment of interest upon outstanding bonds. It follows that, if the bonds are valid, the moneys have been properly applied. As to the first two issues of bonds, amounting to \$1,050,000, we hold them to be valid. Again, all bonds of the \$650,000 issue in the hands of bona fide holders are certainly good and valid bonds. There is no allegation in the bill that any of the \$650,000 issue are not now in the hands of bona fide holders. We then assume them to be in such hands, and the result flows from such assumption that the \$400,000 of net earnings have been legally expended.

We have already disposed of plaintiff's main attack upon the validity of the \$650,000 issue of bonds of the defendant corporation. But he has inaugurated many others of lesser importance. Some of his positions are not well taken, while others are so defective in statement as to go for naught when assailed by technical demurrer. As illustrative of these allegations we cite the following: "That six per cent bonds, legally issued and properly secured, were worth much more than their face value, to wit, fifteen per cent more in this market." As an allegation that the six per cent bonds issued by this defendant corporation were worth fifteen per cent premium, this is a total failure. Again: "That plaintiff is informed and believes that for the purpose of more fully concealing their method of appropriating the bonds and moneys of each and all of said corporations . . . defendants Martin and Ballard (with the consent and connivance of de-

fendants Adams, Magee, and Lynch) furnished the materials and provided the labor to work and equip said railroad systems under the firm name of W. H. Martin & Co.; that large profits were made and charged against the defendant corporation by said W. H. Martin & Co.; that no accounting has ever been had with either of said corporations, or body of the stockholders thereof, in reference thereto." If this language amounted to an allegation of fact, it would seem that the liability set out would be a liability against Martin and Ballard. They made the profit, and should refund it. Doing these things "with the consent and connivance of the defendants Adams, Magee, and Lynch" is hardly a sufficient allegation to show a liability against them. Yet, conceding their liability, it would be a different liability from that of Ballard and Martin. But plaintiff only alleges that he "is informed and believes" these things. This is not a good allegation. A denial that plaintiff "is informed and believes" would create an issue of no importance to the litigation. The defendants should not be called upon to answer allegations of this kind, and as to such matters the court was fully justified in sustaining the demurrer.

We conclude our investigation with a passing notice of one additional matter. At the date of the deal between these corporations the directors of all of them were the same. If the defendant corporation had other stockholders than its five directors, the plaintiff probably stood alone in that capacity. As already shown, eliminating his interest, this transaction was unassailable from all points; but, allowing his status as a stockholder at that time, the mere fact that these corporations dealt with each other, all having the same board of directors, does not stamp the transaction void *ipso facto*. It is no more void than though one director should sell his corporation a plant for the conduct of a factory. Under any circumstances, it would only be voidable: *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 329; *Hammond v. Hopkins*, 143 U. S. 224, 36 L. Ed. 134, 12 Sup. Ct. Rep. 418; *Barr v. Railroad Co.*, 125 N. Y. 263, 26 N. E. 145. If the contract was made in good faith; if it was profitable to the stockholders of the defendant corporation; if, as we have shown in this case, the defendant corporation received at least \$150,000 worth of property for nothing—we hardly see how a dissatisfied stockholder, indulging in

the wild presumption that such a one could be found, would be able to avoid it in a court of equity. It would not seem that one dissatisfied stockholder could avoid it, if one hundred others were satisfied with and actively approved it. Under those conditions he would have no cause of complaint. He would show no equity, and a chancellor would not listen to him for a moment. On the face of the bill it would appear that he was not truly representing the corporation, viz., the stockholders, and he would have no standing in court. "The rule is well established that, unless under peculiar and exceptional circumstances, a court of equity will not interfere to set aside a transaction in itself voidable only, unless it appears that the complainant has sustained or may sustain some damage": *Hill v. Nisbet*, 100 Ind. 354. Mr. Thompson, in his work on Corporations (volume 4, section 4492), says: "Moreover, the conduct complained of must work substantial injury to the corporation, or at least to the complaining stockholder. If the injury is slight and inconsiderable, and affects all stockholders alike, and no other stockholder complains, it will not afford ground of equitable relief: Citing *Albers v. Exchange*, 45 Mo. App. 206. Thus it was held that a purchase made by a corporation would not be set aside because one of the directors was shown to have been interested in it, where it wrought no damage to the complaining stockholder: Citing *Hill v. Nisbet*, 100 Ind. 341. So, where a contract with a corporation is fulfilled to the satisfaction of the directors, and it appears that the work is beneficial to the corporation and done on favorable terms, a court of equity will not enjoin the payment of the stipulated compensation, on the allegation of one of the stockholders that there is a secret agreement between one of the directors and the contractor to divide the profits: Citing *Havens v. Hoyt*, 59 N. C. 115. So, where a corporation was insolvent and unable to continue its business, and the directors sold the corporate property to a new corporation, of which they were the officers and stockholders, and certain stockholders of the old corporation brought an equitable action, alleging that the property had been sold for less than its value, it was held that they could not undo the transaction, but could recover only the losses sustained by the old corporation by reason of the price received; and it appearing that the property sold for more than it was worth, and that the old corporation and the stock-

holders were the gainers through the transaction, it was held that the plaintiffs were not entitled to any relief: Citing *Manufacturers' Sav. Bank v. Big Muddy Iron Co.*, 97 Mo. 38, 10 S. W. 865." It is conceded that there are transactions which courts of equity will set aside on grounds of public policy, simply because they operate to place the trustees in a position antagonistic to the interests of the cestui que trust, and this, too, regardless of any question of benefit to be derived by the beneficiary from the transaction. But, when the directors in making the contract are acting for corporations upon both sides, the application of that principle would seem to be somewhat different: *San Diego, O. T. & P. B. R. Co. v. Pacific Beach Co.*, 112 Cal. 53, 33 L. R. A. 788, 44 Pac. 333. Still, this is not a contract opposed to public policy, and therefore is not void. We have no doubt but that this transaction could have been ratified by the stockholders of the defendant corporation, and, if that be so, public policy did not forbid it; for, if opposed to public policy, it would have been beyond all ratification.

It follows from what has already been said that the bill is demurrable upon grounds too numerous to mention. For the relief sought by the prayer there is a substantial non-joinder of parties defendant. As against the parties defendant there is a fatal misjoinder of causes of action. The statute of limitations is a bar to a large portion of the relief sought. The bill is ambiguous and uncertain in scores of paragraphs. Necessarily the order of the trial court in sustaining the demurrer was legally sound beyond all doubt. And the only question remaining on which plaintiff may rest is that the court abused its discretion in not allowing him to amend the bill. The record nowhere discloses that he asked to amend, and, in the absence of such a showing, it must be presumed that he concluded to stand or fall upon his fifth complaint: *Buckley v. Howe*, 86 Cal. 605, 25 Pac. 132. But conceding to the contrary, and that he was anxious and ready to make the sixth effort, how can it be said that the trial court abused its discretion in denying his request? The present bill is the fifth attempt and fourth amended pleading. Having failed so signally upon a fifth effort, we are clear that the trial court in its discretion was fully justified in assuming that a sixth, seventh and eighth effort would likewise fail, and that the fault of the pleading did not lie in

the pleader, but in the facts. Plaintiff has labored for twenty-one months to make a proper pleading, and failed. He has been allowed time enough; at least it cannot be said that the trial court abused its discretion in ending the matter. The judgment is affirmed.

We concur: McFarland, J.; Van Fleet, J.

Opinion for reversal by BEATTY, C. J.:

This is an appeal by the plaintiff from the judgment of the superior court rendered in pursuance of an order sustaining the demurrers of the several defendants to a fourth amended complaint, and refusing leave to further amend. There is no bill of exceptions, and the record consists exclusively of the fourth amended complaint, the demurrers, the order sustaining them, and the judgment in favor of the defendants for their costs. The attempt of plaintiff to make an addition to this record by filing a certified copy of a demurrer to one of his former complaints is resisted by defendants, but since the only object of plaintiff is to show by this means that defendants are now estopped to raise some of the specific objections contained in their last demurrer, and since the objections which he thus seeks to obviate are immaterial, it will be unnecessary to consider either the amendment or the objections to it.

The complaint deals with a number of transactions, and is very long and involved. It does not follow a chronological order, or any order, and the facts are not alleged with the clearness and precision required in pleading. It contains much that is irrelevant, and is in several particulars uncertain and ambiguous. I shall endeavor to state, as well as I can in reasonable space, the facts upon which the plaintiff seeks to recover.

It is alleged that on or about the ninth day of December, 1886, the defendants W. B. Martin, John Ballard, W. J. Adams, Thomas Magee and H. H. Lynch "combined together, connived, and concocted a fraudulent scheme to acquire franchises to construct, equip, and operate street railroads in the city of San Francisco, state of California; to convey said franchises to the street railway corporations hereinafter mentioned, and organized by said defendants; to fraudulently and unlawfully issue to themselves, and thereupon divide among themselves, and convert to their own use, without sub-

scribing or paying therefor, the entire unsubscribed for shares of capital stock of each of said corporations, and to fraudulently issue said shares of stock, and enter the same upon the books of the corporations as fully paid shares, and thus deceive and mislead future purchasers of said stock and creditors of said corporations as to the financial condition of said corporations and the intrinsic value of said shares of stock, and by this means illegally obtain and maintain the control of said corporations and their franchises and affairs, by voting and using as their own property said unsubscribed and unpaid for shares of capital stock; to illegally vote to themselves, while members of the board of directors of said corporations, and thus receive and appropriate to their own use, divers and large sums of money as salaries, compensation for services and interest on money loaned by or through the directors of said corporations; to cause said corporations to illegally create bonded indebtedness vastly in excess of the amount of the subscribed capital stock of said corporations, and beyond the ability of each or any of said corporations to repay; to illegally issue to themselves and appropriate said bonds to the sole use and benefit of said defendants Martin, Ballard, Adams, Magee and Lynch; and to fraudulently appropriate to their own use the entire net earnings of said defendant corporation."

I have presented this paragraph of the complaint in its literal terms, because it sets forth the alleged conspiracy, in pursuance of which all the subsequent acts of the five defendants named, whether wrongful, blameless or laudable, are charged to have been done.

The first thing they did was to obtain, by means of ordinances of the city of San Francisco (and without paying the city anything therefor), various franchises for the construction and operation of street railways. Throughout the complaint and argument on the part of plaintiff it is assumed, as one of the material facts of the case, that these franchises—covering many miles of the streets of the city—were of no pecuniary value; the only basis of the assumption being the fact, recited in parentheses, that the defendants Martin et al. paid the city nothing for them. I merely wish to remark, in passing, that the fact assumed cannot be inferred from the fact stated, and, even if it could, this is not the way to plead issuable facts. I think, moreover, the plaintiff would scarcely

have been willing to verify by his oath a complaint alleging in direct terms that these franchises were of no pecuniary value.

The next thing the organizers (so, for the sake of brevity, I shall hereafter designate the five defendants, Martin, Ballard, Adams, Magee and Lynch) are said to have done was to organize, December 9, 1886, a corporation known as the Powell Street Railway Company. The proposed capital stock of this company, as shown by its certificate of incorporation, was \$2,000,000, divided into twenty thousand shares, of the par value of \$100 per share. Each of the organizers subscribed in writing for forty of the shares, which was barely a sufficient subscription to enable them to incorporate under the laws of California, and thereupon they closed the subscription list. Afterward, it is said, they all duly became stockholders in said corporation to the extent of forty shares each; which means, I suppose, that they paid in at least ten per cent upon their subscriptions, and received, and duly receipted for, certificates of stock. It is next alleged that, except the aggregate subscription of two hundred shares, of the par value of \$20,000, made by the organizers, "no other shares of the capital stock of said corporation were ever subscribed for or paid for by any other person, association, or corporation." On October 13, 1887, the same defendants organized the Park and Cliff House Railway Company, with a nominal capital stock of \$500,000, divided into five thousand shares, of which each of the organizers subscribed for twenty shares, whereupon the subscription list was closed; and on December 14, 1887, they organized the Ferries and Cliff House Railway Company, with a nominal capital stock of \$2,500,000, divided into twenty-five thousand shares, of which each of the organizers subscribed for fifty shares, whereupon the subscription list was closed. In these corporations, also, it is said, that all of the organizers afterward duly became stockholders to the extent of their respective subscriptions; which means, as I again infer, that they made the necessary payment of at least ten per cent upon their subscriptions, and received and receipted for their stock certificates. As to these companies, also, it is alleged that, except the subscription of one hundred shares, of the par value of \$10,000, in the Park and Cliff House Company, and two hundred and fifty shares, of the par value of \$25,000, in the Ferries and Cliff

House Company, "no other shares of said corporations were ever subscribed for or paid for by any other person, association or corporation." But this allegation, in the mouth of this plaintiff, is shown by other parts of the complaint not to mean all that the pleader might be supposed to have intended; for it appears that all the stock of the Powell Street Company and all the stock of the Ferries and Cliff House Company, over and above the respective amounts originally subscribed for, was subsequently issued in exchange for property and franchises. In effect, therefore, the allegation amounts only to a statement of the pleader's conclusion that stock issued in exchange for property or franchises transferred to a corporation is neither subscribed nor paid for.

Another legal conclusion stated in this connection is that each of these corporations, although organized at different times, was but a corporate agency to carry out the scheme and devices alleged in the complaint; that they were practically one and the same corporation, were so treated by the directors, and, finally, were all "unified" in the defendant corporation. To support this general statement, the following facts are alleged: That from the time of the organization of said corporations down to the commencement of this action the organizers have been the self-elected directors and principal officers thereof, or have had those positions filled by certain dummy stockholders, who were their mere servants or agents, voting and acting on all occasions as the organizers directed. That from the dates of the several transfers and assignments to the Ferries and Cliff House Company of the properties and franchises of the other companies, as subsequently alleged, "neither said Powell Street Railway Company nor Park and Cliff House Company have ever possessed, claimed, or exercised any greater or other benefits from their said acts of incorporation than the right to keep alive their several corporate names, and said corporations have since the said assignments remained and continued dormant and inactive corporations; they have transacted no business, and have had no officers, offices, clerks or employees of their own, but maintain ostensible offices, and are served whenever service is necessary at the places of business and by the clerks and employees of the defendant corporation."

On the 22d of December, 1886, occurred the first meeting of the directors of the Powell Street Company. All the

directors (the organizers) were present, and, since they owned all the stock, all the stockholders were present. At this meeting it was unanimously resolved that the company would issue nine thousand eight hundred of its shares (making, with the two hundred shares originally subscribed, ten thousand shares) to the organizers in exchange for all the franchises, privileges, rights of way and easements granted to or conferred upon them by orders (of the city) numbered 1871, 1881 and 1882. At the same meeting it was also resolved, *nem. con.*, to issue to the Bay Shore and South San Francisco Railway Company the remaining ten thousand shares of the Powell Street Company's stock in exchange for a transfer of "all franchises, easements, privileges, rights of way, property owned by it by order No. 1856." All this stock (nineteen thousand eight hundred shares) was to be issued as "fully paid up." These resolutions were subsequently carried into effect by the transfer of the franchises, etc., and I suppose by the issuance of the stock, although that fact is nowhere expressly alleged. Upon the organization of the Park and Cliff House Company certain other franchises, rights of way, etc., derived from the city and from other sources, were transferred to that company by the organizers, but whether or not any stock was issued to them in exchange for this transfer we are left to conjecture. As against the plaintiff, however, the silence of the complaint on this point makes against him, so far as the invalidity of the acts which he assails depends upon the nonissuance of this stock; and therefore I assume that the stock of the Park and Cliff House Company was issued to the organizers in the same way that the stock of the Powell Street Company was issued to them, and to the Bay Shore and South San Francisco Company. This being the condition of the two corporations—Powell Street Company and Park and Cliff House Company—as to organization and distribution of stock, on February 17, 1887, the organizers, being all present and duly convened as a board of directors of the Powell Street Company, caused said company to create an indebtedness by the issue of \$700,000 of bonds, bearing interest at the rate of six per cent, and on July 30, 1887, caused said corporation to make, execute and deliver to "John R. Jarboe and Thomas Brown, as trustees for the benefit of the holders of said bonds, a trust deed or

mortgage of all the property, real and personal, rights, interests, and franchises, vested and contingent, of said corporation, and also all rights of way and all street railroads then laid or to be laid by said corporation, and all motors, engines, and rolling stock belonging to said company." This mortgage, or trust deed, was duly recorded on September 10, 1887, and on September 12th all of said bonds—\$700,000 in amount—were delivered to Martin and Ballard, who, it is alleged, converted them to their own use. (The exhibit attached to the complaint—Exhibit C—shows that at this date neither Martin nor Ballard was a director of the company, and it also shows that the bonds were issued for the purpose of constructing the Powell Street Railway.)

On December 19, 1887, the organizers caused the Park and Cliff House Company to create a bonded indebtedness of \$350,000, secured by deed or mortgage to the same trustees—Jarboe and Brown—which deed was duly recorded April 26, 1888. These bonds, also, were all issued and delivered to Martin and Ballard on March 5, 1888, "as payment and compensation for and in full of their services for building and equipping the road of this [Park and Cliff House] corporation." Four only of the directors were present at the meeting when this order was passed, and two of them were Martin and Ballard. The value of the road constructed by them under the franchises of the Park and Cliff House Company is alleged never to have exceeded \$200,000.

On December 29, 1887, the organizers, being all present and duly organized as a board of directors of the Ferries and Cliff House Company, in consideration of five dollars and the transfer and assignment of all the franchises and other property of the Powell Street Company, passed a resolution and executed a contract with Brown and Jarboe, its trustees, to the effect that the Ferries and Cliff House Company would assume and become primarily liable for the bonded and other indebtedness of the Powell Street Company. It was also a part of the consideration for the transfer of the Powell Street Company's property that twenty thousand shares of the stock of the Ferries and Cliff House Company should be issued to the stockholders of the Powell Street Company—so apportioned that for each share they held in the latter company they would receive one share in the former. This part of the agreement was subsequently carried out in accordance with

a resolution of the organizers, acting as the board of directors of the Ferries and Cliff House Company, on January 22, 1888. In the body of the complaint it is charged that all this (twenty thousand shares) was issued by the organizers to themselves, but Exhibit C shows that one-half of it was issued to the Bay Shore and South San Francisco Company, and it does not appear from any part of the complaint that this corporation was, as plaintiff assumes in his argument, composed of the same five persons who organized the other corporations, or that they were interested in it to any extent whatever.

On March 5, 1888, a similar transfer and assignment of all the franchises and other property of the Park and Cliff House Company was made to the Ferries and Cliff House Company in consideration of its assumption of the bonded and other indebtedness of the Park and Cliff House Company, and the issuance of the remaining four thousand seven hundred and fifty shares of its stock to the stockholders of the Park and Cliff House Company in proportion to their respective interests therein. All of this stock (twenty-four thousand seven hundred and fifty shares) was by the express terms of the resolution of the organizers, acting as directors of the Ferries and Cliff House Company, declared to be, and issued as, "fully paid," and soon after its issuance was put upon the market by the organizers and sold to the extent of several thousand shares. It was listed in the stock board and quoted at from \$30 to \$70 per share, and plaintiff, in ignorance of the manner in which it had been issued, purchased one hundred shares of it as a permanent investment. He also purchased one hundred of the two hundred and fifty shares originally subscribed for, but when his respective purchases were made, in what order, or for what price, we are left in ignorance. The allegation is: "That heretofore, to wit, in the month of February, 1888, plaintiff became, ever since has been, and still is, a stockholder of record on the books of defendant Ferries and Cliff House Railway Company, and at the time of the commencement of this action was, and still is, the owner of, to wit, one hundred shares of the subscribed capital stock of said defendant corporation." By this we are expected to understand that in February, 1888, the plaintiff became the owner of record, and has ever since so continued, of one hundred of the two hundred and fifty shares

originally subscribed by the organizers. But, obviously, it does not necessarily mean anything of the kind. He might have become a stockholder of record on the books by his purchase of one share of the stock he treats as fictitious, and only acquired the genuine stock the day before he commenced the action. However, as it is not, in my view, at all material which or how much stock he purchased in February, 1888, I shall assume that it was as plaintiff contends he has alleged it.

Plaintiff never was a stockholder in any of these corporations except the Ferries and Cliff House Company. With the Powell Street Company and the Park and Cliff House Company he had nothing to do, except in so far as he is brought into connection with them by the fact that their roads, franchises, and other property became a part of the "system" of the Ferries and Cliff House Company by means of the transactions above detailed. This "system," it seems, was, at some time subsequent to his becoming a stockholder, completed and put in operation. Highly favorable reports of its success were made by its officers. Net earnings were said to be accumulating, and dividends would soon be regularly paid. The plaintiff, in reliance upon these reports and the good faith and business capacity of the organizers, paid assessments upon his stock to the extent of \$2,400, and for about three years waited patiently for dividends. None being forthcoming, he began to grow suspicious, and instituted inquiries into the condition and management of the corporation and the companies which had been "unified" in it. It is not clear from the complaint which or how many of the facts above detailed he discovered after this time, but his argument implies that he then first became aware of the manner in which the stock of the various companies had been issued and manipulated, of the extent of their bonded indebtedness, the circumstances of its creation, and the disparity between the value of the corporate property and the extent of the corporate obligations. His investigation also was delayed and protracted by the denial of his right to examine the books of the corporation, and by its neglect to keep and preserve proper books, records and vouchers, and especially by the absence of any construction accounts. However, he did discover, either then or after the filing of his original complaint (December 10, 1892), the facts above stated, and the further fact that, in addition to the assumption of the bonded debt of the Powell

Street Company (\$700,000), and of the Park and Cliff House Company (\$350,000), the organizers had, on the thirteenth day of February, 1889, while acting as the board of directors of the Ferries and Cliff House Company, created a bonded indebtedness for that company of \$650,000, making a grand aggregate of \$1,700,000 of bonded debt. These bonds, like others, were secured by mortgage or deed of trust of the corporate property to Brown and Jarboe, trustees, and, like the others, the bulk of them were handed over on December 11, 1889, to Martin and Ballard in settlement of their demands for construction of road, etc., which demands, it is alleged, were fictitious. A smaller portion of these bonds was at the same date issued to others of the organizers upon claims not very clearly defined, and the balance was subsequently disposed of to raise money to pay interest on the bonds previously issued or assumed by the corporation bonds originally issued to, and to a large extent still held by, the organizers themselves. This further issue of bonds by the Ferries and Cliff House Company was the act of the directors alone, without notice of any kind to the stockholders, and the bonds, all of which went into the hands of the directors themselves, were accounted for at par, when, as it is charged, they were actually marketable at fifteen per cent premium. It is further alleged that all the property of the Ferries and Cliff House Company, aside from certain property paid for with money raised by assessment upon the stockholders, is of no greater value than \$1,200,000 (this, however, excludes, I suppose, the value of its franchises, which, on the theory of the plaintiff, are worth nothing, because they cost nothing); that its business since the completion of its "system" has been extremely profitable, resulting in net earnings of \$400,000, all of which have gone to pay interest and certain unfounded demands and unauthorized expenditures of the organizers. Another allegation upon which plaintiff greatly relies is this: "That, in furtherance of said fraudulent scheme, no meeting of the stockholders of any of said corporations, other than as herein specified, was ever called or held for the purpose of fixing the amount of the capital stock required for the construction, equipment and operation of either of said railroads; and none of the officers of either of said corporations have ever sworn to or filed in the office of the Secretary of State a certificate showing the amount of stock fixed at such meeting,

nor that the whole of the subscribed capital stock of each of said corporations has been fully paid up, as is by law required." Other matters set forth in the complaint, including the facts alleged by way of excuse for delay in bringing the action, and the numerous conclusions of law which constitute a large portion of its bulk, can be more conveniently stated in the course of the discussion in connection with the propositions in which they are involved.

The action was commenced by the plaintiff on the tenth day of December, 1892, in behalf of himself, the defendant corporation, and all other stockholders who might elect to be joined as coplaintiffs. Originally, it is said, it was an action for discovery, but by legal development it has become an action for an accounting, which, in view of the voluminous prayer for specific relief, is, I think, rather too modest a statement of its aim and scope. It is not easy, indeed, to make a brief statement of the relief claimed. The first and most important item is that the Ferries and Cliff House Company shall be decreed to be the owner of all the property ever owned or possessed by the Powell Street Company or the Park and Cliff House Company, and that neither of those companies has any interest in or claim to any of said property. Here plaintiff seeks a decree quieting title against two corporations not parties to the action. He contends that they are unnecessary parties, because they are dormant, inactive, etc., and because their stockholders are parties. But this is not true, for half of the stock of Powell Street Company is shown to have been issued to Bay Shore Company, and it is not shown that the organizers have any interest in that company. Here, therefore, would be a defect of parties defendant if any case was presented for a decree quieting title. But, really, there is no such aspect of the case. Neither corporation is alleged to be asserting any adverse claim, and if they were they could not be joined as defendants, unless they were claiming the same property.

The next item of relief prayed is that it may be decreed that no portion of the capital stock of either of said railway companies was ever subscribed for or lawfully issued, except two hundred shares of the Powell Street Company, one hundred shares of the Park and Cliff House Company, and two hundred and fifty shares of the Ferries and Cliff House Company. Third. That the transfer by the organizers, act-

ing as directors, to themselves, of twenty-four thousand seven hundred and fifty shares of the Ferries and Cliff House Company's stock, was fraudulent, fictitious, inoperative and void. Fourth. That the organizers hold said twenty-four thousand seven hundred and fifty shares as trustees of the corporation; that it be returned to the treasury of the company, and there remain as its property. Fifth. That the agreement of December 29, 1887, between Ferries and Cliff House Company and Jarboe and Brown, by which that corporation assumed the payment of \$700,000 of Powell Street Company's bonds, was the unlawful creation of a bonded indebtedness as to all in excess of \$20,000; and that the agreement as to such excess was fraudulent, fictitious, inoperative and void. Sixth. That the agreement as to Park and Cliff House bonds, as to all in excess of \$5,000, be similarly dealt with. Seventh. That the \$650,000 bonds of Ferries and Cliff House Company, and the deed to secure them, as to all in excess of \$25,000, were fraudulent, fictitious, etc.; that the bonds be given up and canceled, and the mortgage satisfied of record. Eighth. "That the said defendants W. H. Martin, John Ballard, W. J. Adams, Thomas Magee, and H. H. Lynch account to the said Ferries and Cliff House Railway Company for all moneys received and gains made by them, or either of them, as commissions, emoluments or profits claimed or taken in their, or either of their, own names, or in the names of their, or either of their, agents, representatives or servants, or of any other person or persons acting for or controlled by them, or either of them, as directors or employees of the Ferries and Cliff House Railway Company, defendant in this action." Ninth. "That they, the said defendants W. H. Martin, John Ballard, W. J. Adams, Thomas Magee and H. H. Lynch, directors and officers of the defendant corporation, be made to account for and pay over to said defendant Ferries and Cliff House Railway Company the net earnings of said defendant company from the twenty-eighth day of March, 1888, to the day and date of said accounting." Tenth. That the organizers be enjoined from transferring stocks or bonds and from paying interest on bonds in excess of \$25,000; that plaintiff may recover punitive damages, etc. Eleventh. That Ferries and Cliff House Company may have a joint and several judgment against defendants, as fiduciary trustees, for what they have misappropriated, and for costs, and general relief.

By these various prayers the plaintiff has no doubt asked for relief against corporations and other persons who are not parties to the action, for relief in one action against different persons as to whom the causes of action are distinct, and for relief to which he is in no event entitled. But, in determining the sufficiency of his complaint, these inconsistencies of the prayer may be disregarded.

The relief asked in the first clause is wholly outside of the case, for the reasons above stated. The other clauses of the prayer, from the second to the eleventh, inclusive, all bear upon the accounting which he demands as against the organizers. So far as they ask a decree invalidating large issues of stocks and bonds which may have passed into the hands of bona fide purchasers, I do not understand that the plaintiff hopes to obtain a judgment binding in this respect upon any person not a party to the action. The only defendants against whom this relief is prayed, except the organizers, are Jarboe and Brown, who are alleged to have taken the stock held by them (if any) with full knowledge of all the circumstances attending its issuance. It is alleged that large amounts of the bonds are held by transferees of the organizers unknown to plaintiff, who took them with notice of their invalidity, and he asks leave, when their identity shall be discovered, to serve them and bring them in as defendants, which he has the undoubted right to do. Until they are so brought in he does not claim or expect a decree binding upon them as to the validity of their bonds. As against the organizers, however, he does claim that the court should decree, as the basis of their accounting, that there is no valid indebtedness of the Cliff House and Ferries Company in excess of \$25,000, and no valid stock in excess of two hundred and fifty shares; that they (and their transferees, with notice, when discovered and made parties) must give up for cancellation such stocks and bonds as remain in their hands, and that they must account to the corporation for the true value of all unlawfully issued stocks or bonds that have become valid obligations, by transfer to innocent purchasers, if any such there be, and especially that they must restore to the treasury of the corporation the money they have expended to pay interest upon the bonds, for the issue of which they are solely responsible, and the proceeds of which he alleges they have fraudulently converted to their own use.

No doubt the demands of the plaintiff are grossly extravagant. The net result of the decree he asks would be, as defendants point out, that his corporation would own property of the admitted value of \$1,400,000, exclusive of its franchises, to which at the time of filing his last amended complaint there was \$400,000 of net earnings to be added. Against this there would be a debt of only \$25,000, and of the balance of \$1,775,000, exclusive of the franchises, he, as the holder of one hundred of the two hundred and fifty valid shares, would be the owner of two-fifths, i. e., he would have \$710,000 in return for an investment of something less than \$20,000. But, if the claims of plaintiff are extravagant, it is equally true that the net result of denying him any relief would be the total loss of all he has honestly invested in the shares of the company, and of his legitimate share of the profits of an enterprise which, according to the facts admitted by the demurrers, has been extremely successful.

I shall endeavor to show that the justice of the cause lies somewhere between these extremes, and that justice is not unattainable in this proceeding. The first proposition upon which plaintiff relies in support of his claims is that there never was any subscribed stock in either of the three corporations besides the shares subscribed for preliminary to their formation, viz., two hundred shares in Powell Street Company, one hundred shares in Park and Cliff House Company, and two hundred and fifty shares in the Ferries and Cliff House Company, and, consequently, that their respective bonded debts in excess of the par value of their subscriptions—\$20,000, \$10,000 and \$25,000—were utterly void by reason of the statutory prohibition (Civ. Code, sec. 309) against the creation of debts in excess of subscribed capital.

This proposition is wholly untenable for several reasons. In the first place, the subscribed capital stock of a corporation referred to in section 309 of the Civil Code includes the entire lawful issue of the stock of a corporation, and is not limited to the shares formally subscribed for as a necessary preliminary to the filing of the certificate. To form a corporation, under the laws of this state, the projectors must file a certificate (Civ. Code, sec. 290), and that certificate must show, among other things: "(6) The amount of its capital stock and the number of shares into which it is divided; (7) if there is a capital stock, the amount actually sub-

scribed, and by whom." If it is a railroad corporation, there must be subscribed at least \$1,000 for each mile of the contemplated work (Civ. Code, sec. 293), and the certificate must show that at least ten per cent of the subscribed capital stock has been paid in to the treasurer of the intended corporation (Civ. Code, sec. 291).

This shows that in forming a railroad corporation the first essential is the preliminary organization of persons willing to subscribe \$1,000 per mile for the projected work, and to pay in to their provisional treasurer ten per cent of their subscription. For this purpose a subscription list must be opened, but it may be closed just as soon as a sufficient amount is subscribed to satisfy the statute. Such was the course pursued by these organizers, and the closing of the subscription lists signified nothing more than that they wished to proceed with the organization of the corporation without waiting for other subscriptions, or that they desired to keep it entirely under their own control. Whatever their motive, they did nothing in this matter that the law forbids or discountenances. Nor was their action a fixing of the capital stock of the corporations, within the meaning of section 458 of the Civil Code. The sections above referred to (sections 290-293) plainly show that the proposed capital stock is one thing, and the stock preliminarily subscribed is another, and that it never was the intention of the legislature to limit the issue of corporate stock to the amount subscribed as a condition or prerequisite to the filing of the certificate of incorporation. On the contrary, the law sanctions the practice, so long and so universally followed, of issuing, after incorporation, the shares not previously subscribed, up to the aggregate number mentioned in the certificate. How such issuance is to be regulated and controlled we need not stop to inquire, except so far as it concerns this case. Conceding that the directors have no power to issue them except at par, and upon payment of the same amount that has been called on previously issued shares, it cannot be denied that by unanimous concurrence of all the directors and all the stockholders they may be issued for less than their par value in money or in exchange for property; for who, in such case, could complain? The strictest limitation that is to be found upon the power of corporations to issue their shares is contained in section 11 of article 12 of the constitution, which provides that "no corporation shall

issue stock or bonds except for money paid, labor done or property actually received, and all fictitious increase of stock or indebtedness shall be void." Here, by the clearest implication, is permission given by the state to issue stock in exchange for labor or property, and stock so issued is neither fictitious nor void as to the public. If all the stockholders have consented to its issue, they cannot complain. Existing creditors are not affected by the issue, because their rights, as against stockholders, are measured by the issue and distribution of shares at the time their respective claims accrued. As to subsequent creditors dealing with the corporation upon the faith of its ostensible capital, they would have no cause of complaint unless they could show that they had been defrauded by an overvaluation of the property given in exchange for the stock, in which case they could have recourse against the stockholders: *Handley v. Stutz*, 139 U. S. 427, 35 L. Ed. 227, 11 Sup. Ct. Rep. 530, and authorities there cited. Stock issued in exchange for property is therefore not void, or even voidable, when it has been issued by unanimous concurrence of all the directors and all the existing stockholders of a corporation.

Applying the above reasoning to the action of the organizers in issuing the stock of the Powell Street Company and of the Park and Cliff House Company to themselves in exchange for street railway franchises, it appears that the issue was entirely regular and valid, for they all concurred in the act, and they owned all the previously issued stock. They were the whole corporation—directors, trustees and stockholders. The transaction was the simple and ordinary one of incorporating a business of any sort—commercial, mining or manufacturing—where the partners or co-owners put their mine or factory or stock in trade into a corporation and receive stock of the corporation in exchange. To attempt to invalidate such a transaction upon the ground that the directors, in issuing the stock to themselves, violate their duty as trustees of the stockholders, is absurd. They are themselves the stockholders, beneficiaries and trustees at the same time, and there can be no conflict of interest between them.

But the plaintiff contends that, although these stocks may have been lawfully issued, they do not constitute "subscribed capital stock," within the meaning of section 309 of the Civil Code, which prohibits the directors of corporations from

creating debts beyond their subscribed capital stock. Both the constitution and the statutes of the state, however, use the phrase "subscribed capital stock" again and again to designate all the stock of a corporation which has been lawfully issued, whether formally subscribed for or not, as well as stock that has been subscribed for but not issued. And, indeed, the use of the expression in this sense is perfectly proper; for every stockholder necessarily subscribes in receipting for the certificate of his stock, and thereby binds himself to pay any call to which it is subject. Section 3 of article 12 of the constitution provides that each stockholder shall be individually and personally liable for such proportion of its debts as the amount of stock owned by him bears to "the whole subscribed capital stock." This clearly implies that all lawfully issued stock is ranked as subscribed stock. The same provision is contained in the statute (Civ. Code, sec. 322), where the phrase "subscribed capital stock" is used in the same sense and with the same implications. By section 331 of the Civil Code the directors are authorized to levy assessments only upon the "subscribed capital stock." Would plaintiff contend that no assessment can be enforced against a holder of stock unless he subscribed a formal agreement to take it before it was issued? Section 359 of the Civil Code provides that the capital stock of a corporation may be increased by a vote representing two-thirds of its entire capital stock. The word "subscribed" is here omitted. Why? Because there is no occasion to increase the capital stock of a corporation while any part of the stock named in its certificate remains unissued, and, when it is all issued, the entire capital stock and the subscribed stock are identical.

In *Barron v. Burrill*, 86 Me. 75, 29 Atl. 938, it was held, under a statute similar to our own, that the receipt of shares had the same effect in fixing the obligation of the shareholders to the corporation and its creditors as a regular subscription. To the same effect, see *Handley v. Stutz*, 139 U. S. 427, 35 L. Ed. 227, 11 Sup. Ct. Rep. 530; *Sanger v. Upton*, 91 U. S. 56-64, 23 L. Ed. 220; *Chubb v. Upton*, 95 U. S. 665, 24 L. Ed. 523; and see *Stockton etc. Agricultural Works v. Houser*, 109 Cal. 1, 41 Pac. 809.

The organizers did not, therefore, contract any indebtedness beyond the subscribed capital stock in issuing \$700,000 bonds of Powell Street Company, and \$350,000 bonds of

Park and Cliff House Company. And, even if there had never been more than \$20,000 of Powell Street Company or \$10,000 of Park and Cliff House stock subscribed or issued, the bonds in excess of those amounts would not have been affected by anything contained in section 309 of the Civil Code. The provision of that section relied on by the plaintiff merely restricts the power of the directors as agents of the corporation. It is designed, primarily, as a protection to stockholders, and, incidentally, to protect creditors, and, if observed, will have that effect. Here, however, the directors and stockholders were identical, and what the stockholders consented to they cannot complain of. There were no existing creditors, and those who became creditors by accepting the bonds would not be greatly benefited if the bonds were declared void. It would be a most singular method of redressing their grievances, if they have any.

It is not necessary to resort to the doctrine of *Underhill v. Improvement Co.*, 93 Cal. 300, 28 Pac. 1049, to sustain the validity of these bonds, but, if it were, the decision in that case would furnish another complete answer to plaintiff's objections.

The next contention of plaintiff is that the respective debts of these several corporations are all invalid, because none of them has ever fixed its capital stock and filed the proper certificate of full payment, as required by sections 458 and 459 of the Civil Code. The law does not declare what shall be the consequence of a failure to comply with these provisions, and this complaint does not show that the conditions have arisen which would make it incumbent upon these companies to take the prescribed action. We need not, therefore, stop to consider the scope and object of this part of the law. It is sufficient for the present purpose to say that neither the sections cited nor section 456 impose any restriction upon corporations as to their power to contract debts, except that the debt must not exceed the capital stock. They are not required to fix their capital stock before contracting a debt otherwise than as it is fixed by the certificate of incorporation, and whether the amount of lawful indebtedness which they may incur is limited only by the statement in the certificate as to the amount of capital stock, or by the amount of stock subscribed, is a matter of indifference in this case; for not one of

these corporations has ever incurred a debt in excess of its "subscribed capital stock."

The next transaction of the organizers assailed by the plaintiff is their assumption in behalf of Ferries and Cliff House Company of the bonded debt of Powell Street Company, and the issuance of twenty thousand shares of the stock of the former company to the shareholders of the latter. This was determined upon in December, 1887, and consummated in January, 1888, before the plaintiff had become a stockholder, and while the organizers held all the stock of each of the two corporations concerned in the transaction. What has been said above, therefore, respecting the issue of stock and bonds by Powell Street Company and Park and Cliff House Company equally applies to the issue of this stock and assumption of this debt by Ferries and Cliff House Company. All that was done was done by unanimous concurrence of all the directors and all the stockholders. There could be no violation by the directors of their duties as trustees, because they were at the same time sole beneficiaries and sole trustees, and no conflict of interest between the individual and the representative was possible. The twenty thousand shares of stock were issued in exchange for property on terms expressly agreed to by every party in interest, and the issue was, as has been shown, lawful. The bonded debt was within the amount of the stock simultaneously subscribed, and was therefore a lawful issue, even if it had been the act of the directors alone, and a fortiori was lawful as the act of the entire body of stockholders, not in contravention of any constitutional or statutory inhibition, and not in conflict with any interest of creditors. Indeed, there appear to have been no creditors other than the holders of the bonds, payment of which was then assumed.

A special objection to the issuance of these twenty thousand shares of stock urged by plaintiff is that by the exchange of properties they took the place of the original capital of Powell Street Company, which the directors were forbidden to divide among the shareholders: Civ. Code, sec. 309. It is true that the organizers violated their duty as trustees of Powell Street Company by making a division of these shares (*Kohl v. Lilienthal*, 81 Cal. 378, 6 L. R. A. 520, 20 Pac. 401, 22 Pac. 689), and thereby subjected themselves to the liabilities to creditors and stockholders of that corporation prescribed by

the statute. But since they were the only stockholders, and the creditors appear to have consented to the transaction (they, it seems, were also the holders of the bonds and the only creditors), this transgression of the law by the organizers in their character of directors of Powell Street Company could not have the effect of invalidating the issue of Ferries and Cliff House stock. The plaintiff, at all events, is not in a position to raise the question, for he is not and never was either a creditor or stockholder of Powell Street Company.

In the month of February, 1888, then, at which time plaintiff first became a shareholder in Ferries and Cliff House Company, the affairs of that corporation, as shown by its books and records, were in this condition: Its certificate capital was \$2,500,000, divided into twenty-five thousand shares, of which two hundred and fifty shares had been subscribed prior to filing its certificate, and twenty thousand shares subsequently issued as "fully paid up" in exchange for property by the act of all its directors, concurred in by all its stockholders. This issue of stock was, as has been shown, lawful, and the result was that the directors were thereby empowered by the stockholders to incur a bonded indebtedness of \$2,025,000. This power they had exercised to the extent of assuming the payment of \$700,000 of Powell Street Company's bonds. No stockholder was in a position to complain of anything they had done in the way of issuing stock or incurring indebtedness, and the plaintiff, as successor in interest to the person from whom he purchased his stock (whether it was part of that originally subscribed or of that which was subsequently issued), was in this respect in no better position than his assignor. If he bought stock without making any inquiry into the condition of the corporation, he must suffer the consequences of his own improvidence. If he made inquiry, and was deceived, he may have had a right to rescind as against his vendor, but he has no claim upon this score against the directors or other stockholders.

From this time forward, however—from the moment the organizers began to transfer the stock of the Ferries and Cliff House Company to outsiders; from the time, in other words, when the directors ceased to be their own sole beneficiaries—their acts and conduct must be judged by a different standard. They then became bound, in all matters connected with their

trust, to act with the highest good faith toward their beneficiaries. They could not deal with the trust property for their own profit. They could take no part in any transaction concerning the trust, in which they had an interest adverse to their beneficiaries, without their consent. In short, they became subject to the strict application of the law governing the relation of trustee and cestui que trust. The leading principles of that law are too familiar to require further statement, and, tested by those principles, the transaction by which the debt of Park and Cliff House Company (amounting to \$350,000, and held by the organizers themselves) was assumed in behalf of Ferries and Cliff House Company, and four thousand seven hundred and fifty fully-paid shares of the latter company issued to themselves in exchange for property admitted by the demurrer to have been worth no more than \$200,000, was a flagrant breach of trust, and a fraud upon plaintiff and all other stockholders in the same situation. The transaction, it is true, was substantially the same as that with Powell Street Company, except that it lacked the consent of all the stockholders of Ferries and Cliff House Company, but that difference was fatal (Civ. Code, sec. 2230); and a cause of action thereby accrued to the corporation, which, upon failure of the corporation to act, could be enforced at the suit of any dissatisfied stockholder.

It is contended, however, by respondents that this transaction, though voidable, was not absolutely void, and could therefore be validated by express ratification or by an implied ratification evidenced by acquiescence or by laches. This proposition is undoubtedly correct. The consent of all the stockholders of Ferries and Cliff House Company would have made the transaction with Park and Cliff House Company exactly as regular and legitimate as that with Powell Street Company, and as valid in every respect, and a subsequent ratification by all the stockholders would have been as effective as a previous consent. The only question is whether there has been any ratification. It is not pretended that there has been any express ratification by plaintiff or by any of the class of stockholders which he represents, but it is said that a rescission of the contract was the proper course and that a failure to rescind or to offer to rescind is ratification. This may be so in ordinary cases, but it is difficult to see how the doctrine can be applied to a dissatisfied

stockholder, who is entirely without the power to rescind the contracts of the directors. He has nothing under his control which he can restore or offer to restore, and his only remedy, in case of a failure or refusal of the directors to act, is to institute an action for the enforcement of such rights as he has. In this case I suppose the plaintiff might have demanded either one of two things: He might have asked the court to decree the rescission which he was powerless to effect, or he might have affirmed the transfer of the property, and compelled his trustees to account to the corporation for their profits. He has not, in his prayer for relief, confined himself to either of these alternatives, but has made the rather extravagant demand that the title of all the property formerly belonging to Park and Cliff House Company be confirmed to his corporation, and that all the bonds assumed and stock issued in exchange be declared void. He is, of course, not entitled to this measure of relief; but under his prayer for general relief, and in view of the facts, he could demand an accounting to the corporation for the excess of liabilities assumed and stock issued over the value of the property taken in exchange, unless his action is as to this matter barred by the statute of limitations. Here, however, I think the plaintiff encounters an insuperable obstacle. The transaction with Park and Cliff House Company took place March 5, 1888, and was at that time recorded in the books of Ferries and Cliff House Company. The plaintiff was at that time, and has ever since continued to be, a stockholder of the latter company. As such he had the right to inspect its books and records, and by inspecting them could have learned all the particulars of its dealings with Park and Cliff House Company. His cause of action was then complete, and although in cases of fraud the cause of action is not deemed to have accrued for the purpose of setting the statute of limitations in motion until the discovery of the fraud by the party aggrieved (Code Civ. Proc., sec. 338), still knowledge is imputed to those who have the means of knowledge at hand, and they cannot prolong their right of action by remaining in ignorance of that which they ought to know. Here the cause of action arose in March, 1888, and the means of knowledge were simultaneously placed in plaintiff's reach by recording the transaction in the books of his corporation. But he for

more than three years (the whole period of limitation) neglected to make any inquiry. His excuses are that he was absent from the state for considerable periods; that he had confidence in the directors, and was misled by their reports; and he believes he would have been denied access to the books if he had requested an inspection. I think these excuses are insufficient to relieve plaintiff from the consequences of his neglect, and that he is now precluded from attacking the assumption of the debt of the Park and Cliff House Company, or the issuance of the four thousand seven hundred and fifty shares of the Ferries and Cliff House stock, and also from demanding an accounting for that transaction.

But the statute interposes no bar to his demand for an accounting for the issue of \$650,000 of Ferries and Cliff House bonds by the organizers to themselves. They were issued on and subsequent to the eleventh day of December, 1889, and the action was commenced December 10, 1892—one day short of three years after the wrong complained of. The action was therefore commenced in time, and there can be no doubt of the right of plaintiff, upon the admitted facts, to demand the accounting. The mere fact that the directors issued the bonds to themselves in payment of their own demands against the corporation, and that they have never accounted to the corporation, would, in itself, be sufficient to support the action; but it is also alleged, and by the demurrer admitted, that the bonds were taken by the directors at their face value when they were actually worth fifteen per cent premium, and that their claims for construction, etc., were for more than was justly due.

Plaintiff claims that none of the directors were entitled to receive anything for services or supplies furnished in the construction of the roads, and bases his contention on the provisions of section 18 of article 12 of the constitution, which reads as follows: "No president, director, officer, agent or employee of any railroad or canal company shall be interested, directly or indirectly, in the furnishing of material or supplies to such company nor in the business of transportation as a common carrier of freight or passengers over the works owned, leased, controlled or worked by such company, except such interest in the business of transportation as lawfully flows from the ownership of stock therein." I do not con-

strue this section as applying to the original construction of a railroad. By its terms it seems to be confined to the operation of the road when completed. But, however this may be, no penalty is prescribed for a violation of this provision, and the only consequence of its infraction is that contracts by officers of a railroad company to furnish it material or supplies would be invalid and unenforceable. But this would not preclude the allowance in an accounting of the just value to the company of any materials actually furnished by its directors and actually used in the business of the road.

The claim of the plaintiff that this whole issue of bonds of Ferries and Cliff House Company was void, because in excess of its subscribed capital, has been sufficiently answered. Another ground upon which their validity is attacked is that this was an increase of the bonded debt of the corporation without the consent of the stockholders, and therefore in violation of section 359 of the Civil Code. A careful reading of that section, however, as it stood prior to the amendment of March, 1889, in connection with other provisions of the code, leads to the conclusion that it only applied to those cases in which it was desired to create an indebtedness in excess of the stock which the corporation had the power to issue. In such cases it was necessary to increase the capital stock as a prerequisite to the increase of indebtedness, and for the increase of capital stock the consent of the stockholders is necessary. But when the existing debt of a corporation was within the amount of its subscribed capital, and a proposed addition to its indebtedness would leave the total amount still within the amount of its subscribed capital, this was not the increase of bonded debt contemplated by section 359 (as it existed February 13, 1889) requiring the consent of two-thirds of the stockholders.

There is, indeed, no objection that I can see to the validity of any of these bonds in the hands of bona fide holders. But so far as they remain in the hands of the organizers, or of their transferees, who took them with knowledge of the facts, they may be called in and canceled to the extent that they exceed the just and lawful claims of the directors of the company, to be ascertained on the accounting, and, if enough of them cannot be recalled to square the account, the organizers are jointly and severally liable for the deficiency.

For the reasons above given it seems clear beyond dispute that the complaint states with sufficient certainty a cause of action against Martin, Ballard, Adams, Magee and Lynch for an accounting of the proceeds of \$650,000 bonds of Ferries and Cliff House Company, and as to this cause of action there is no defect or misjoinder of parties. All the parties against whom the accounting is sought are made defendants. The corporation is a necessary party, and Brown and Jarboe, if not strictly necessary parties, are certainly not improper parties to an action one object of which is to invalidate bonds of whose holders they are trustees. To this action for an accounting Powell Street Company and Park and Cliff House Company are not proper parties, and the demurrer for defect of parties names no other defendant who should be joined. It goes partly upon the ground that the present holders of the stocks and bonds which it is sought to invalidate should be made parties, but the complaint shows that these holders, aside from the defendants, are unknown to plaintiff, and the demurrers do not disclose their names. Plaintiff asks leave and should be allowed to bring them in when they are disclosed.

The complaint states no case for a decree quieting title against anyone, and the prayer for that relief, and for all other relief not warranted by the facts alleged, should simply be disregarded. Such being the case, it was error in the superior court to sustain the demurrers generally. There were, as has been indicated, some specific grounds of demurrer that were well taken, and the order should have been limited to those grounds. So limited, it would not have justified the conclusion and judgment "that the plaintiff is not entitled to any relief against the defendants, or against any of them," etc. On the contrary, there would have remained a clear case for substantial relief; and, though the court might have been justified in requiring the plaintiff to strike out some of the redundant and irrelevant matters contained in the complaint before requiring the defendants to answer, it could not deny him **any** relief. Judgment reversed and cause remanded, with leave to the plaintiff to amend his complaint in accordance with the views herein expressed.

We concur: Henshaw, J.; Temple, J.

LIVINGSTON v. CONANT.

L. A. No. 400; January 10, 1898.

51 Pac. 859.

Support of Husband—Liability of Wife.—Under Civil Code, section 155, providing that husband and wife contract toward each other mutual obligations of support, and section 176, providing that the wife must support the husband when he is unable to do so from infirmity, the wife may be required to contribute to the support of her infirm husband out of her separate estate.¹

Trial.—A Finding of a Fact Clearly Without the Issue, and not required to support the judgment, is harmless error.

APPEAL from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by Samuel W. Livingston against Frederick Conant, administrator, etc., substituted for Mary A. Livingston, deceased. From a judgment for the plaintiff, defendant appeals. Affirmed.

I. H. Johnson for appellant; G. A. Gibbs for respondent.

PER CURIAM.—The principal objection urged by appellant, that section 176 of the Civil Code does not contemplate or warrant the character of relief sought in the action and awarded by the judgment below, was, after very mature consideration, decided adversely to appellant's contention in *Livingston v. Superior Court*, 117 Cal. 633, 38 L. R. A. 175, 49 Pac. 836—an original proceeding, resting primarily upon the judgment here involved, decided since this appeal was taken. The question is, therefore, no longer an open one.

The other points demand no extended consideration. The complaint sufficiently stated a cause of action, and the motion for a nonsuit was properly denied, since there was evidence sufficient to sustain each of the findings upon which the judgment rests. The finding that defendant had deserted plaintiff is, as contended, clearly without the issues; but this finding may be disregarded, the judgment in no respect requiring such fact for its support. The error is therefore an immaterial one. The judgment and order are affirmed.

¹ Cited in the note in 38 L. R. A., N. S., 958, 966, on alimony or maintenance independently of divorce.

PEOPLE v. DOLE.*

L. A. No. 257; January 18, 1898.

51 Pac. 945.

Forgery.—Where Defendant, in a Prosecution for Forgery, testified in his examination in chief that he had won the check in question at a game of cards, and also testified to his arrest, it was proper, on cross-examination, to ask him if he had admitted such fact to the arresting officers or to the jail officers.

Forgery.—On a Trial for Forgery, Testimony That Witness knew of a certain fluid which would remove ink marks from white paper was competent. If such evidence was irrelevant, the admission of it was harmless.

Forgery.—It was Harmless Error to Charge That Defendant was guilty of forgery, if he abetted the commission of the crime, where there was no evidence that he had done so.

Criminal Law.—The Court Should not Charge in the Disjunctive that a defendant is guilty if he "aided, abetted, or assisted" any other person to commit the crime.

Criminal Law.—Error in Using the Disjunctive in a Charge That Defendant was guilty if he "aided, abetted, or assisted" any other person to commit the crime was harmless.

Criminal Law.—It was Harmless Error to Charge That "Where Weaker Evidence is produced, when in the power of the party to produce higher, it is presumed that the higher evidence would be adverse, if it had not been produced," where the record did not show that defendant offered weaker evidence when it was in his power to produce higher.

Criminal Law—Instructions.—Where the Evidence was Largely Direct and Positive, it was not prejudicial error to charge that, where the evidence is entirely circumstantial, yet it is not only consistent with the guilt of defendant, but inconsistent with any other rational conclusion, the jury must convict, notwithstanding such evidence may not be as satisfactory to their minds as the direct testimony of credible eye-witnesses would have been.

APPEAL from Superior Court, Los Angeles County.

E. J. Dole was convicted of forgery, and he appeals. Affirmed.

H. T. Gage, Walter Bordwell and W. I. Foley for appellant; Attorney General Fitzgerald for the People.

*For subsequent opinion in bank, see 122 Cal. 486, 68 Am. St. Rep. 50, 55 Pac. 581.

GAROUTTE, J.—The defendant has been convicted of the crime of forgery, in raising the amount of a check from \$2.50 to \$850, and also forging certain indorsements thereon, with intent to defraud the State Loan and Trust Company. He is also charged with uttering the check as forged, with intent to defraud said loan and trust company.

1. The demurrer to the information was properly overruled, and likewise the objections to the admission of the check in evidence. There were some differences disclosed between the check set out in the information and the one introduced in evidence, but those differences were slight, and in no degree so substantial as to justify the rejection of the check in evidence by reason of the variance.

2. The defendant testified in his own behalf, and explained his connection with the check by stating that he won it from one Adams in a game of cards at Los Angeles city. He further testified that he was subsequently arrested in the city of San Francisco for the crime here charged. Upon cross-examination he was asked if he ever stated to the arresting officer, or to the officers of the Los Angeles jail, who held him in custody subsequent to his arrest that he obtained the check from Adams, or secured the possession of it in the manner aforesaid. To this line of cross-examination defendant objected upon the grounds that it was an invasion of his constitutional rights, and also not proper cross-examination. If the questions addressed to the defendant were proper cross-examination, then certainly no violation of his constitutional rights is shown. The lines drawn by the decisions of this court, marking the limits of the cross-examination of a defendant when he goes upon the witness-stand, are not clearly defined. Penal Code, section 1323, declares that he may be examined as to all matters about which he was examined in chief. This is substantially the rule of cross-examination as to other witnesses. In *People v. Gallagher*, 100 Cal. 475, 35 Pac. 80, the question here presented is carefully considered by the court; and upon a review of the California cases it is declared that any question that would have a tendency to elicit the truth from the witness as to the matters about which he has testified in chief, or anything that would explain, limit, modify or destroy the force of the evidence given in chief, is within the domain of proper cross-examination. It is there declared that by cross-examination his conduct

may be shown to be inconsistent with his statements made upon the witness-stand in his own behalf, and the negative answers of the witness to the questions now under consideration, to some degree certainly, indicated conduct inconsistent with the evidence he had given in his examination in chief. It might be said that the evidence of his conduct in this regard was in no sense conclusive of the fact sought to be established by it, but its weight was for the jury alone, and it cannot be said that it was absolutely valueless upon the point toward which it was directed. It is declared in the Gallagher case that, as to matters testified to by a defendant in chief, the doors are opened "for the most searching investigation, by cross-examination, as to the accuracy of his testimony, as fully as any other witness who might have given the same testimony." Tested by this rule, the cross-examination furnished no valid ground for objection. The case of *People v. Elster*, 2 Cal. Unrep. 315, 3 Pac. 884, cited to this point by appellant, is not authority, for the reason that the defendant was not a witness in his own behalf.

3. Under objection, a witness testified that he possessed knowledge of a certain fluid that would remove ink marks from white paper. The only purpose of such evidence would be to show that this check could have been raised from \$2.50 to \$850. The fact that the check had been raised from the smaller to the larger amount is practically conceded by the evidence; that is, there is clear and positive evidence to that effect, and nothing whatever to the contrary. Looking at the testimony, under these conditions, we are unable to see how the evidence materially strengthened the case for the people. But, aside from this, if it had any effect looking to the establishment of a material fact in the case, it was competent and admissible. If it had no such effect, then it was immaterial, and certainly entirely harmless. No possible injury to the defendant can be imagined from its admission, conceding it to be immaterial, and the error committed would be mere abstract error.

4. The trial judge gave the jury the following instruction as to the law of the case: "The court instructs the jury that if you believe from the evidence beyond a reasonable doubt that the defendant committed the offense charged in the information, or aided, abetted, or assisted any other person or persons to commit the same, then you should find the de-

fendant guilty." There is no evidence in the case to justify a jury in believing beyond a reasonable doubt that the defendant aided, abetted and assisted in the commission of the forgery. Under the evidence disclosed by this record, he was either a principal or not guilty, and for that reason that portion of the instruction bearing upon the defendant as an accessory should not have been submitted to the jury. Again, conceding the instruction pertinent to the facts of the case, the disjunctive conjunction "or" should not have been used between the verbs "aid," "abet" and "assist." They should have been joined by the conjunction "and." By technical legal construction, a person may assist or aid in the commission of a crime, and still be possessed with no criminal intent, and therefore in no sense an accessory to the crime. While most probably the verb "abet" imports criminality, "aid" and "assist" do not. Yet it was said in *People v. Bruggy*, 93 Cal. 486, 29 Pac. 26: "The practical administration of justice should not be defeated by a too rigid adherence to a close and technical analysis of the instructions of the court. Instructions are for the enlightenment of the jury as to the law of the case, and a jury never enters into such character of analysis in construing them." And we are satisfied that the instruction here under consideration did not mislead the jury to defendant's prejudice. To the ordinary mind, one who aids or assists in the commission of the crime of forgery is guilty; and this is true because to such a mind criminality is included as an element in the act of the party aiding or assisting. To the ordinary understanding, it would seem that as a person could not commit the crime of forgery without knowing it was a crime, neither could he aid nor assist in its commission without being aware of the criminality of his acts.

5. The court also instructed the jury as follows: "Where weaker evidence is produced, when in the power of the party to produce higher, it is presumed that the higher evidence would be adverse if it had been produced." This instruction embodies a very poor attempt to express the principle of law of presumptions declared in subdivision 6, section 1963 of the Code of Civil Procedure. This subdivision of the section, properly quoted, is as follows: "That higher evidence would be adverse from inferior being produced." It will be observed that the adjective "weaker" is not used

in the subdivision, and we are hardly prepared to say that "weaker evidence" and "inferior evidence" cover the same ground. Under the evidence in this case we find no demand for the giving of the presumption of law attempted to be declared by the foregoing instruction, even if it be conceded to be a proper principle to be given in exceptional criminal cases. But, again applying the principle laid down in the Bruggy case, we see no prejudicial error. The evidence called for no such instruction. By the record it is nowhere disclosed that the defendant offered "weaker" evidence when it was in his power to produce "higher" evidence. Hence the jurors, as honest men of average intelligence, could not have been misled by the declaration of the court in this regard. There being no facts in the case for the application of the principle, we feel that no injury resulted to defendant from the charge.

6. The court gave the jury the following instruction: "Where the evidence is entirely circumstantial, yet it is not only consistent with the guilt of the defendant, but inconsistent with any other rational conclusion, the law makes it the duty of the jury to convict, notwithstanding such evidence may not be as satisfactory to their minds as the direct testimony of credible eye-witnesses would have been." In view of the fact that the evidence in this case was not "entirely circumstantial," but very largely direct and positive, the facts of the case did not justify the giving of this instruction. Again, the distinction attempted to be made in the degree of evidence necessary to convict in cases of circumstantial evidence, as compared to cases of positive and direct evidence, is not satisfactory to this court. While the general principle declared here has some support in the case of *People v. Cronin*, 34 Cal. 201, yet it has been looked upon with disfavor in the later case of *People v. Eckman*, 72 Cal. 582, 14 Pac. 359. The better practice would be to refrain entirely from declaring any such distinction in instructing the jury in criminal cases. Under the facts of this case, the error is not a substantial one.

7. By a diminution of the record very serious objections to certain other instructions have been overcome; and, as to the refusal of the court to give defendant's instruction No. 10, we are satisfied the subject matter thereof is fairly covered by people's instruction No. 20. There are many other

grounds relied upon for a reversal of the judgment and a new trial. We have examined them all with care, and hold them insufficient to effect that result. Judgment and order affirmed.

We concur: Harrison, J.; Van Fleet, J.

FITZGIBBON v. LAUMEISTER et al.*

S. F. No. 547; January 21, 1898.

51 Pac. 1078.

Fraudulent Conveyances—Sufficiency of Evidence—Appeal.—Where the controlling issue was whether or not a certain conveyance was fraudulent as to creditors of the grantor, and there was abundant evidence to support the findings of the court, the conclusion drawn therefrom was not open to review, on appeal from an order denying a new trial and from a judgment in accord with such findings.

Fraudulent Conveyances.—In an Action to Restrain the Sheriff from Selling certain real estate on execution against plaintiff's grantor, the court did not err in denying a nonsuit, where plaintiff rested on the introduction in evidence of the deed to him, and it appeared that the execution creditor made no claim to the property, except such as was derived from such grantor subsequent to the date of such deed.

APPEAL from Superior Court, City and County of San Francisco; D. J. Murphy, Judge.

Action by Morris Fitzgibbon against C. S. Laumeister and another. From an order denying a new trial, and from a judgment in favor of plaintiff, defendant Weatherly, the execution creditor, appeals. Affirmed.

Chas. F. Hanlon for appellant; E. W. McGraw for respondent.

HARRISON, J.—The plaintiff brought this action to restrain the defendant Laumeister, as sheriff of the city and county of San Francisco, from selling a certain piece of real estate owned by him in said city, under an execution issued upon a judgment against the plaintiff's grantor in

*Rehearing denied.

favor of the defendant Weatherly. The defendant Laumeister made default, and the defendant Weatherly answered, alleging that the conveyance to the plaintiff was made with the intent to hinder, delay and defraud creditors, and that the threatened sale by the sheriff was for the purpose of enforcing his claim as a creditor against the grantor in the deed. The cause was tried without a jury, and the court finds that the purchase of the property by the plaintiff was made by him in good faith, and the conveyance therefor was made for a valuable and adequate consideration paid by him to the grantor at and before its execution, and was received by him in good faith, and not with any intention to hinder, delay or defraud the defendant or his assignor, or any creditor of said grantor. Judgment was entered accordingly in favor of the plaintiff. A motion for a new trial was made upon the ground that the evidence was insufficient to sustain the findings and decision, and was denied by the court. From this order, and also from the judgment, the defendant Weatherly has appealed.

The controlling issue in the case is whether the conveyance to the plaintiff was bona fide or fraudulent, and with intent to hinder, delay or defraud the creditors of his grantor. Nearly all the evidence presented to the trial court was upon this issue, and there is abundant evidence in the record to support the findings of the court. The argument of the appellant in this court is directed to the proposition that the court found contrary to the evidence, and resolves itself into contending that the court made erroneous inferences of fact from the evidence and gave to the testimony of the plaintiff and his grantor greater weight and credit than it was entitled to receive. This argument was appropriate with the trial court, and presumably was made before it by the defendant, but, as it presents only the conclusion to be drawn from conflicting evidence, the conclusion which was drawn by the trial court is not open here to review.

The court did not err in denying a nonsuit. The plaintiff rested upon the introduction in evidence of the deed to him. It appeared by the pleadings that the defendant made no claim to the property, except such as was derived from the grantor in the deed subsequent to its date. The claim that the deed was fraudulent was an affirmative defense, of which, at the time the motion for a nonsuit was made, no evidence

had been given, and the deed itself imported a consideration sufficient to vest the plaintiff with the grantor's title to the property. The judgment and order are affirmed.

We concur: Beatty, C. J.; Van Fleet, J.

RAMSBOTTOM v. FITZGERALD et al.*

Sac. No. 279; February 17, 1898.

52 Pac. 149.

Appeal.—The Finding of the Jury upon a Substantial Conflict of evidence will not be disturbed, though the evidence seems to preponderate in appellant's favor.

APPEAL from Superior Court, San Joaquin County.

Action by R. Ramsbottom against B. M. Fitzgerald and others. Judgment for plaintiff, and defendants appeal. Affirmed.

J. G. Swinnerton for appellants; Elliott & Elliott for respondent.

PER CURIAM.—The only question presented is whether the evidence sustains the finding of the jury that the deed from defendants to plaintiff was intended as an absolute conveyance of the property, in satisfaction of the pre-existing indebtedness, and not as a mortgage to secure such debt. It would subserve no useful purpose to state the evidence, but it is sufficient to say that while, to our minds, it would seem to preponderate strongly in favor of defendants' contention that the deed was intended as a mortgage, there certainly was direct and positive evidence tending to support the finding, and of a character to create a substantial conflict. This conflict was to be determined by the jury, and in such a case we cannot, under long-established principles, disturb their verdict. Judgment and order affirmed.

*Rehearing denied.

FOULKE et al. v. DE WITT (HINES, Intervener).

S. F. No. 814; March 4, 1898.

52 Pac. 476.

Vendor and Purchaser—Authority of Agent—Execution—Sale—Satisfaction—Vendor and Vendee.—Where a Husband and Wife sue to compel a conveyance of land to the wife, and he alleges in the complaint that he has no interest in the land, defendant cannot object that he was bound to convey to the husband, who had not in writing authorized a conveyance to the wife, as the complaint is a sufficient authorization.

Vendor and Vendee.—A Husband Contracted to Buy Land, and thereafter the wife tendered the amount due, and then sued to compel a conveyance to her. In the meantime an intervener had bought the land under an execution in his favor against the husband, and received a certificate of sale. Held, that the intervener could not complain of a decree requiring the wife to deposit with the clerk the amount of such execution, costs, interest, etc., to be paid to him upon his discharging his certificate, as a condition precedent to a conveyance to her by defendant.

APPEAL from Superior Court, Fresno County.

Action by Sarah I. Foulke and husband against H. G. De Witt and J. N. Hines, intervener. Defendant and intervener appeal from the judgment. Affirmed.

L. L. Corey and L. W. Moultrie for appellants; Geo. B. Graham for respondents.

SEARLS, C.—Action brought in the county of Fresno to enforce the conveyance by defendant to Sarah L. Foulke, wife of the other plaintiff, of certain lots of land in the town of Clovis, in said county of Fresno. Afterward J. N. Hines intervened in the action, claiming an interest in the property adversely to the plaintiffs. Judgment was rendered in favor of the plaintiffs and against the defendant, and in favor of intervener, from which judgment the defendant and intervener prosecute this appeal. The record contains a bill of exceptions, and the appeal was taken within sixty days from the entry of judgment.

The facts, as stated in the complaint and found by the court, may be briefly stated as follows: The plaintiff Sarah

I. Foulke, wife of her coplaintiff, on or about November 27, 1894, negotiated with the owners of the lots described in the complaint, through H. G. De Witt, for the purchase of said lots. A written agreement was entered into, by the terms of which the vendors agreed to convey the lots to H. A. Foulke, the husband of plaintiff, the latter giving his promissory notes for the purchase price, except the sum of \$10 paid in cash from the money of the wife. This agreement was executed for the vendors by defendant, De Witt, as their agent. Plaintiffs entered into possession of the lots and constructed a house thereon. Subsequently defendant, De Witt, represented to the plaintiffs that the vendors were desirous of changing the streets adjoining said lots, and the lots to such an extent as to conform to the streets. Thereupon the written agreement was surrendered to De Witt, who turned the same over to the vendors, paid or procured the notes given by H. A. Foulke, and took a deed to the lots in his own name. De Witt surrendered the notes to plaintiff, and agreed to convey the property to plaintiffs when paid therefor the amount due him, viz., \$177.37. On November 7, 1895, plaintiff Sarah L. Foulke tendered the amount due to De Witt, and demanded a deed in her own name; the other plaintiff at the same time notifying said De Witt that the lots were the sole property of said Sarah I. Foulke, and that he, the said H. A. Foulke, had no interest therein, and he disclaims any interest in the complaint. Defendant refused to execute the deed. The complaint avers in a general way the agency of H. A. Foulk for his coplaintiff.

The pleading is defective in many respects, and would have been held bad as against a special demurrer, but is regarded sufficient as against the general demurrer interposed. The defendant De Witt denies making any contract with Sarah I. Foulke, but avers making the contract with H. A. Foulke. In his testimony he detailed the facts showing that he knew nothing of any interest being claimed by the female plaintiff until about the time the deed was demanded, and testified that he then offered to deed the property to H. A. Foulke, or to Mrs. Foulke, if certain claims of Hines and another were paid. Indeed, the defendant seems to have acted in good faith, and with a view to preserve the property to the husband plaintiff, whom he supposed to be the owner. There is nothing in the fact urged that the authorization of H. A.

Foulke was not in writing. The plaintiffs, by their complaint, have in writing and in the most solemn manner ratified the act of purchase.

The intervener, J. N. Hines, by his complaint in intervention, set out, in substance, that on the twenty-eighth day of October, 1895, he obtained a judgment against H. A. Foulke in justice's court for \$137.15; that execution issued thereon was levied upon the lots of land involved herein, and a sale had, at which he became the purchaser for \$139.90; that he received a certificate of sale, which he still holds; and that no redemption has been made. The court below decreed that the plaintiff Sarah I. Foulke deposit with the clerk for the intervener the amount of his demand, to wit, \$148.30, as a condition precedent to the delivery of a deed to her from the defendant, said sum to be paid to Hines upon his discharging his certificate of purchase, etc. The intervener thus obtained judgment for his claim in full, with interest. There are some technical errors in the record, but, as the appellants do not seem to be injured thereby, and appear to have suffered no injustice by the judgment, except in the matter of costs as heretofore indicated, we recommend that the judgment be affirmed.

We concur: Britt, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

MEYER v. MEYER.

S. F. No. 733; March 2, 1898.

52 Pac. 485.

Alimony—Support of Child—An Order was Made in a Divorce suit requiring the husband to pay to his wife (defendant) alimony pendente lite, \$125 per month, and \$200 counsel fees. There was one son, aged twelve years, who lived with his mother. Defendant's father had conveyed to her a house and lot worth at present \$30,000, and yielding a rental of \$135 per month. Two weeks after the suit was commenced, she conveyed it back to her father, without consideration, by deed which was not recorded. The rents thereof were still paid to her. Plaintiff's net earnings

were \$275 per month; his personal expenses \$150 per month. He owed \$600, which he was paying in installments. Held, that the monthly allowance should be reduced to \$50 per month, to include the support and education of the son.

APPEAL from Superior Court, City and County of San Francisco.

Action by Louis Meyer against Matilda Meyer for divorce. From an order made, on defendant's motion, for alimony and counsel fees, plaintiff appeals. Modified.

John Desback for appellant; Napthaly, Friedenreich & Ackerman for respondent.

HAYNES, C.—Suit for divorce. This appeal is from an order made October 17, 1892, on the motion of defendant requiring the plaintiff to pay to the defendant alimony, pendente lite, in the sum of \$125 per month, and \$200 counsel fees. Notice of appeal from said order was served October 29, 1892, but the bill of exceptions was not settled until September 16, 1896. The affidavit of defendant in support of said motion showed that there was issue of said marriage, one son, aged twelve years; that plaintiff is a pilot, and as such earns a monthly sum exceeding \$500, as she is informed and believes; that he contributes nothing to the support of herself or said child, and that she "is now deriving her support through the assistance of relatives"; that it is necessary to employ counsel; and that \$250 per month is a reasonable sum for the support of herself and child. From affidavits and other evidence introduced by plaintiff, among which were the deposition of the defendant and the testimony of her father and brothers, it appeared that said parties to this proceeding were married in 1878; that about four years afterward the defendant's father conveyed to her a house and lot on Van Ness avenue, now of the value of about \$30,000, and at the date of these proceedings was yielding a rental of \$135 per month; that on June 8, 1892 (about two weeks after the suit was commenced), she conveyed it back to her father; that he did not request it; that no consideration was paid for it; that she did not speak to him about it; that she handed the deed to her brother, and told him to deliver it to her father; that, as plaintiff owed her father a good deal of money, and she was dependent upon him, she thought it was right to return the prop-

erty to him, but that this application for alimony had nothing to do with it, and that she had no other property. Nicholas Van Bergen, defendant's father, was examined as a witness on behalf of the plaintiff, and testified that he had nine children, some of them married; that he conveyed real estate to some of them shortly after their marriage; that he did not request the defendant to convey back said property, had not spoken to her about it, had not recorded the deed; that his son collected the rents, and paid them over to defendant; that he gave plaintiff money a great many times, he supposed altogether about \$4,000; that he held his notes for \$1,550, part of said sum; that he kept no account of the other moneys, because he saw there was no use of it. The taxes on said property are about \$170 yearly. Plaintiff's books showed that his average monthly earnings from May, 1884, to August 1892, inclusive, were \$301.81; that his expenses incidental to and necessary in the conduct of his business as pilot are \$25 per month; that his personal expenses are \$150 per month; that he is in poor health and under the care of a physician; that he is indebted to various persons aggregating about \$600, which he is paying in installments; that he is absolutely without means, having no money on hand, and depends entirely on his monthly income, and is fifty-seven years of age. He offered to pay from his earnings \$50 per month for the support and education of his son.

We think the order appealed from should be modified. The defendant ought not to be permitted to impose so serious a burden upon the plaintiff when it appears, as it does here, that she voluntarily, and wholly without consideration, conveyed away valuable property, and thus apparently placed herself in a condition of dependence upon her relatives. This condition, however, seems to be more apparent than real, since it has not in any manner interfered with her receipt of the rents, amounting to \$135 per month. Plaintiff's average monthly income from his services as pilot is, in round numbers, \$300 per month. Certain expenses incident to his office or employment are \$25 per month, leaving a net income of \$275 per month. The plaintiff offered to pay \$50 per month for the support and education of his son, which would leave his net income \$225 per month, out of which his living and all incidental expenses must be paid, and which he testified amounted to \$150 per month, leaving a balance of \$75 to be

applied to the payment of his debts, which amounted to \$600, and to meet those contingencies which a man of his age (fifty-seven years) should anticipate, viz., the inability to pursue his occupation and the added expense of serious illness; while, if we add to the defendant's income of \$135 per month the \$50 offered to be paid by plaintiff for the support and education of his son, she would have an income of \$185 per month, and that, we think, is sufficient.

As to the allowance for counsel fees, if it be conceded that she is still in fact the owner of the Van Ness avenue property, as appellant contends, the income from it is not sufficient to enable her to pay counsel; and as she is the defendant in the action, and not a voluntary party, we think she should not be required to encumber her real estate in order to defend the action; and, as to the amount allowed for that purpose, we do not think it so unreasonable as to justify any interference with the discretion of the court below. We therefore advise that the order appealed from be modified by reducing the monthly allowance from \$125 per month to \$50 per month, such allowance to include the support and education of the son of said parties, and, as so modified, that it be affirmed.

We concur: Belcher, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion, it is ordered that the order appealed from be modified by reducing the monthly allowance to \$50, such allowance to include the support and education of the minor son of said parties, and, as so modified, that it be affirmed.

ORMSBY v. DE BORRA et al.

L. A. No. 249; March 4, 1898.

52 Pac. 499.

Pledge.—An Order to the Pledge-holder of Notes already indorsed, to hold them for the payment of another debt, constitutes a pledge without further delivery.

Appeal.—Where the Evidence is Conflicting, the Findings of the trial court will not be disturbed.

Pledge.—In an Action to Foreclose a Pledge of Notes placed with a bank as pledge-holder, the pledgee is entitled to their possession, and to have them remain in the custody of the bank.

Pledge.—One Having No Interest in the Property pledged is not aggrieved by, and cannot complain of, the sufficiency of the judgment against the pledge-holder, in an action to foreclose the pledge.

Pledge.—Both an Order Directing a Pledgee to Hold notes to secure payment of plaintiff's debt and the notes referred to are proper evidence in an action to foreclose the pledge.

APPEAL from Superior Court, Riverside County.

Action by St. Clair Ormsby against Alex De Borra and another, Mary F. De Borra intervening. From a judgment for plaintiff and an order denying a new trial the intervenor appeals. Affirmed.

J. T. Crowe and Gill & Powell for appellant; Coldwell & Ducal and Purrington & Adair for respondent.

BELCHER, C.—The plaintiff brought this action to recover the amount due on a promissory note for \$1,035, executed by defendant Alex De Borra to plaintiff, and to have foreclosed said defendant's interest and equity of redemption in and to two certain described promissory notes alleged to have been pledged by him to plaintiff as security for the payment of his said note, and to be held by the defendant Orange Growers' Bank as pledge-holder. The prayer was for judgment against defendant De Borra for the sum of \$834.82, and that the said notes so held in pledge be delivered by the Orange Growers' Bank to the sheriff of the county, and sold by him according to law, and that the proceeds of the sale be applied in payment of the amount due the plaintiff. Defendant De Borra answered, but set up no defense to the note sued upon. He denied having pledged the two notes as alleged in the complaint; denied that the Orange Growers' Bank was a pledge-holder of the notes, and alleged that Mary F. De Borra was the true and lawful owner of the said notes, and that, as her agent, he had placed them in the bank for her. The Orange Growers' Bank answered, stating that it had "no interest whatever in the matter in controversy, and is willing to surrender said notes to whomsoever shall be entitled thereto, and for that purpose deposits with this court said notes, to be by said court delivered to the party that this

court shall decide to be entitled thereto." Mary F. De Borra, wife of defendant Alex De Borra, by permission of the court, filed a complaint in intervention, in which she alleged that on the third day of January, 1893, she was the owner of certain real property in the city of Riverside, known as the "Riverside Steam Laundry," and that her husband, acting as her agent, on that day sold said property to certain parties, taking in part payment therefor the two notes which are alleged in the complaint to have been pledged to the plaintiff; that said notes were taken by her husband in his own name, without her knowledge or consent; that her husband placed the said notes in the Riverside National Bank to secure payment to the bank of a certain indebtedness evidenced by his promissory note, which she also signed, and that such indebtedness had been fully paid; that the Orange Growers' Bank became the successor in business of the Riverside National Bank, and as such successor became the custodian of said notes; that she was the true and lawful owner of said notes, and was entitled to the possession thereof, and that she had demanded them from the Orange Growers' Bank, which refused to deliver them to her, and unlawfully detained the same; wherefore she asked judgment for the possession of the notes, and for her costs against the said bank, and for general relief. The plaintiff answered the complaint in intervention, denying all its principal averments, but admitting that the Orange Growers' Bank became the custodian of said notes, and alleging that it became such custodian as pledgeholder for the plaintiff as set forth in his complaint. The case was tried, and the court found, among other things, that all the allegations of the complaint were true, and all the denials thereof and all the counter-allegations in the intervenor's complaint were untrue. Judgment was accordingly entered that the plaintiff recover from the defendant Alex De Borra the sum of \$856.67, and from said defendant and the intervenor his costs, amounting to \$22.10, and that both of said sums were a valid lien upon the two promissory notes set out in the complaint, and were secured by a pledge thereof. From this judgment and an order denying her motion for a new trial the intervenor appeals.

It is claimed for appellant that the findings were not justified by the evidence, and that the court committed several errors in law which call for a reversal. The facts proved

were, in substance, as follows: The plaintiff held three promissory notes made by defendant De Borra, for the payment of which he had no security. He wished to obtain security, and on April 4, 1894, he, with his attorney, A. A. Caldwell, went to see Mrs. De Borra, and asked her to sign the notes as surety. She declined to do so, and said that "the doctor had security, for he had the laundry property and other securities"; that "the doctor ought to pay his debts." "He ought to be able to secure you." "There is the laundry property. He must have security." On the next day plaintiff and his attorney went to see the defendant, and demanded security from him. They told him that Mrs. De Borra said he had security on the steam laundry. He said: "Give me the old notes, and I will give you a new note and security on the steam laundry"; "that he had no notes in his hands which he could turn over to him [plaintiff], but that he would secure him on the notes which were already pledged by him, that were made in his favor from certain parties who ran the steam laundry." Thereupon plaintiff gave up the old notes, and defendant signed and delivered to him, in lieu thereof, the notes sued upon, and at the same time signed and delivered to him a paper reading as follows:

"The Riverside National Bank:

"Please hold the collaterals now in your possession, viz., mortgage and notes on Riverside Steam Laundry, to the payment of Mr. St. Clair Ormsby, and apply same to his notes after your claim is satisfied.

"April 5, 1894.

"ALEX DE BORRA."

The plaintiff and his attorney then took the said note and paper, marked as "Plaintiff's Exhibits A and B," to the Riverside National Bank, and delivered the same to its cashier. The bank then held as security for an indebtedness of the defendant to it notes made to him by the parties who owned the steam laundry, including the two notes in controversy here. The cashier produced the said notes, and exhibited them to the plaintiff, and was told to hold them as security for him. The indebtedness of the defendant to the bank was paid off a few months later, and money was afterward collected by the bank on the notes and indorsed as payments on the plaintiff's note. During all this time defendant had a running account at the bank. Subsequently, but at what

particular time does not appear, the Riverside National Bank went out of business, and sold its goodwill and business to the Orange Growers' Bank, which became, and thereafter continued to be, the custodian of the notes in controversy.

Mrs. De Borra testified: "On January 3, 1893, he [her husband] bought the steam laundry property, with my money, for me. I didn't say anything as to who should take the title to that property. I supposed he took the property in my name, and did not know otherwise till this suit for these notes was brought. My husband had no money. I received mine from my brother's estate. The first payment that I received from that estate was \$12,000, received in the fall of 1892. He sold the laundry, with my knowledge and consent, to the present laundry company. I was present when the sale was talked of. My husband did the business for me, but I knew the parties, and talked with Mr. Conrad and Mr. Crawford. I didn't see the notes taken for the property. I supposed they were made payable to me. . . . The notes were placed in the National Bank as collateral security for a note we owed the bank." And on cross-examination she said: "I don't know that the doctor ever had a deposit of his own in any of these banks. I supposed the doctor checked against this money for the laundry. My bank account was less. I supposed it went there. I never knew he had any money after that date, so I could not say that he paid it with his own. . . . The deeds for the property were not taken in my name. I couldn't tell you whose money bought that land. I don't know that the doctor had any money at that time. I supposed it was my money that paid for it. The doctor does not hold that land as my agent."

During the progress of the trial it was stipulated by counsel for the respective parties to the action "that the property known as the 'Riverside Steam Laundry Property' was originally owned by one J. Wesley Brooks, and that it was transferred by him to the parties composing the Riverside Steam Laundry Company on or about January 3, 1893, and that Dr. De Borra furnished the money for such transfer; that on the third day of January, 1893, or thereabout, the parties composing the Riverside Steam Laundry Company deeded this property to Dr. De Borra, and took from Dr. De Borra a contract for a deed, in which contract the parties composing the Riverside Steam Laundry Company agreed to pay \$3,500,

and that, as evidence of such indebtedness, they signed and delivered notes to Dr. De Borra for that amount of money, in which notes were included the two notes, one for \$100 and one for \$1,000, described in the pleadings in this action; it being understood that the question as to who owned the money furnished by Dr. De Borra is to be determined by the evidence in this case."

1. Following the averments of the complaint, the court found, after reciting the making of the note by defendant to plaintiff on April 5, 1894, "that at the same time the said defendant Alex De Borra indorsed and delivered to the Riverside National Bank, a corporation, then doing a general banking business in the city of Riverside, California, the two promissory notes set out in paragraph three of plaintiff's complaint, as security for the payment of said promissory note set out in paragraph 2." This finding is assailed by appellant as not justified by the evidence; and it is said all the evidence shows "that on the said April 5th, said De Borra did not have said notes in his possession at all; that long previous to that date the said De Borra had indorsed and delivered the said notes to said bank as security for a debt owed by defendant to said bank, and that said De Borra never at any time had possession of said notes, or reindorsed them, or delivered them to the Riverside National Bank as security for plaintiff's note." It is true that the finding is not precisely accurate in its statement of the facts, but it is substantially so. The notes having been already indorsed by defendant, it was not necessary that they be reindorsed; and, having been already delivered to the bank as a pledge, it was not necessary that they be actually delivered to the plaintiff. The indorsements on the notes, and the order to the bank to hold them for the payment of plaintiff's note, constituted, in effect, an indorsement and delivery to him as a pledge. The law applicable to such transactions is stated in Jones on Pledges, section 83, as follows: "A delivery is sufficient which vests the title and control of the paper in the pledgee. Whenever, from the circumstances of the case, an actual delivery is impossible, the pledge may rest upon the contract of the parties, accompanied by the possession of a third person. Thus a note already pledged and in the possession of the pledgee may be again pledged by the owner to another person, subject to the lien of the first pledge, without any

further delivery of it. The possession of the note by the first pledgee may be regarded as the possession of the second pledgee through the agency of the former." Our conclusion, therefore, is that the judgment cannot be disturbed upon any of the grounds specified as objections to the first finding complained of.

2. The court further found that Mrs. De Borra was not, on the third day of January, 1893, or at any time subsequently, the owner of the property known as the "Riverside Steam Laundry"; that the defendant did not on that day, as agent for Mrs. De Borra, sell said property, and take in payment therefor the two notes in controversy; and that Mrs. De Borra never was the owner of said notes, or entitled to the possession thereof. It is claimed for appellant that this finding was not justified by the evidence; and it is said that all the evidence, admissions and stipulations show that defendant bought the said property for Mrs. De Borra with her money, and that as her agent he sold the same, taking in part payment therefor the said two notes, and that she was the owner and entitled to the possession thereof. It is true, Mrs. De Borra testified that the defendant bought the said property with her money, but on cross-examination she said she could not tell whose money bought the property; that she supposed it was her money that paid for it. And, as tending to contradict her statement that she owned the said property and notes, two witnesses testified that when she was asked to sign as surety her husband's notes to the plaintiff she said he had security, for he had the laundry property and other securities; that he ought to be able to pay his debts and to give security. "There is the laundry property. He must have security." Looking, then, at all the evidence, in view of the well-settled rules of this court as to conflicting evidence, we think it cannot be said that this second finding was not justified.

3. The objections to the other findings rest upon the same grounds as those above considered, and, for the reasons already stated, cannot be sustained.

4. Under the head of "Errors in Law" appellant claims that, "if the findings were all warranted by the evidence in the case, still the conclusion of law 'that said plaintiff is entitled to the possession of said notes set out in paragraph 3 of said plaintiff's complaint' is wholly unwarranted by any facts found, and is not sustained by the pleadings." Counsel

fail to quote the whole of the conclusion. They should have added, "And is entitled to have the same remain in the custody of the defendant, the Orange Growers' Bank." We see no error in this conclusion. If, as alleged and found, the notes were pledged to the plaintiff, and were in the custody of the said bank as pledge-holder for him, then, clearly, he was entitled to their possession, and to have them remain in the custody of the pledge-holder. It is also claimed that the judgment was against law, because it did not in any way dispose of the Orange Growers' Bank. But, as the court found that appellant was not the owner of the said notes, nor entitled to the possession of them, she was not "aggrieved" because the judgment was not more full and specific as to the said bank, and therefore cannot be heard to make this complaint of it. The cases cited by appellant in support of this claim are not in point. They were both cases where the appellant was aggrieved by the failure of the trial court to dispose of the whole case by its judgment.

It is further claimed that the court erred in admitting in evidence, over the objection of appellant, Plaintiff's Exhibit B and the two notes in controversy. The exhibit described the notes which it directed the Riverside National Bank to hold for the plaintiff as "notes on Riverside Steam Laundry," and it was proved that the parties who signed them constituted the Steam Laundry Company at that time. It was also proved that the notes objected to were two of the notes referred to. This being so, we fail to see any valid ground for the objections to the admission of the said exhibit and notes in evidence. It follows that the judgment and order appealed from should be affirmed, and we so advise.

We concur: Haynes, C.; Chipman, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

SCHWANNECKE v. GOODENOW et al.

L. A. No. 268; March 15, 1898.

52 Pac. 588.

Ejectment.—Where, in Ejectment to Recover a Storeroom under a lease of the entire building from one of defendants, the complaint alleged a conspiracy between defendants to withhold the property from plaintiff, a finding that the lease gave plaintiff the right of possession of the entire building except such storeroom, which was occupied by the other defendant, negated the issue of conspiracy.

Ejectment.—In Ejectment Against the Lessor and Another Lessee, a finding that plaintiff lessee had no right of possession need not dispose of the relative rights and liabilities of defendants in the property in controversy.

Appeal.—Where There is No Fact not Covered by the Findings which, if found in favor of appellant, could affect the judgment, objections as to want of findings on certain issues are immaterial.

APPEAL from Superior Court, Los Angeles County.

Ejectment by Henry Schwannecke against S. Goodenow and Edward W. Grannis. From a judgment for plaintiff, defendants appeal. Affirmed.

Jones & Weller for appellants; Schultze & Luckel for respondent.

HAYNES, C.—The defendants appeal from the judgment upon the judgment-roll. The original complaint states a cause of action in ejectment to recover possession of a certain storeroom described as the east half of the ground floor of a certain building. Plaintiff claims under a lease executed by defendant Goodenow, the owner of the premises, consisting of a lot with a two-story and basement building thereon, the ground floor being divided into two storerooms, and the upper floor into rooms; the term being for five years from September 1, 1895, the lease bearing date September 1, 1894. The lease describes the premises leased as "all that certain storehouse, with basement and rooms above, situated," etc. The complaint charges a conspiracy between the defendants, whereby Grannis leased from Goodenow, with knowledge of plaintiff's lease, the east half of the ground floor of said build-

ing, and that he withholds the same, etc. The defendants' answer admits the execution of the lease under which plaintiff claims, admits that Goodenow leased to Grannis certain property, but alleged that the property so leased was different from that leased to the plaintiff, and denied the alleged conspiracy. Afterward the plaintiff, with leave, filed an amendment to his complaint, setting up a distinct cause of action to quiet title to the rooms above and the basement beneath the stores, and it was stipulated that the answer to the original complaint should go to the amendment also, and that all allegations should be deemed denied except those admitted by the answer to the original complaint.

The court found, among other things, that the plaintiff was entitled to hold and possess, under said lease, "all that certain storehouse, including all the rooms in the upper or second story, and all the basement underneath the store or ground floor, save and except the certain store occupied by defendant Edward W. Grannis as a grocery"; and that the claims of the defendants thereto "are groundless and invalid, save and except the storeroom now occupied by defendant Grannis as a grocery, and the use of two-thirds of said barn." It is not contended by appellants that the findings do not support the judgment, but it is urged for reversal that "several of the material issues were not found by the court below." The only issue specified by counsel in their brief as not having been found upon is that formed by the allegation of a conspiracy between the defendants by which defendant Grannis obtained a lease of the east half of the ground floor from his codefendant, and was put in possession of it, and defendants' denial, not of the lease, but of the conspiracy. The plaintiff's only right to any part of the property was under the lease, a copy of which was set out in the complaint, and the court found that plaintiff was entitled to the possession of all the building, except the east half of the ground floor, occupied by defendant Grannis as a grocery. This is equivalent to a finding that said east half was not included in the lease under which the plaintiff claimed, and hence it was immaterial how defendant Grannis obtained possession, whether by conspiracy or otherwise, though, as Goodenow is the conceded owner, and had not leased the east storeroom to the plaintiff, the charge of conspiracy is negatived by the finding. It was not necessary to find affirmatively that a lease

was executed to Grannis of the east storeroom, or that he had any right to its possession; for, if the plaintiff had no right to it, it is immaterial to him whether Grannis had any right to it or not. Indeed, there was no issue as to the execution of the lease to Grannis. It was alleged in the complaint, and admitted in the answer, that the lease was made, and the only room for controversy was as to whether the east storeroom was embraced in plaintiff's lease. There is no fact, not covered by the findings, which, if found in favor of the defendants, could affect the judgment; and it should therefore be affirmed.

We concur: Chipman, C.; Britt, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

PEOPLE v. REED.

Cr. No. 350; March 23, 1898.

52 Pac. 835.

Homicide—Self-defense—Evidence.—On a Trial for Murder, the opinions of witnesses at the inquest that the defendant committed the homicide in necessary self-defense were not competent as direct evidence.

Homicide — Self-defense — Evidence. — Where a Defendant Charged with murder was guilty of the first assault upon decedent, though the same was not felonious, it was incumbent on him in good faith to decline further struggle before he could invoke the right of self-defense to excuse the killing.

Homicide—Self-defense—Evidence.—Where It Appears That the Defendant, who made the first assault, received a knife wound and retreated from the deceased, the question whether he then in good faith abandoned the combat, or whether he continued desirous to renew it on the first opportunity, was material in determining his right of self-defense, and where the evidence shows he continued ready and renewed it on the first opportunity, when the deceased was killed, it is sufficient to sustain conviction for manslaughter.

Homicide. — Rebutting Evidence Showing Defendant's Bad Reputation for truth is competent, where he testified in his own behalf.

Homicide.—An Instruction Isolating a Single Item of Evidence, and telling the jury that the fact alone of its admission was insufficient to enable it to draw conclusions in connection with other facts as to the facts it tended to establish, was error.

APPEAL from Superior Court, Placer County.

E. P. Reed was convicted of manslaughter, and he appeals. Affirmed.

Jo. Hamilton for appellant; Attorney General Wm. F. Fitzgerald for the people.

BRITT, C.—Defendant was tried on an information charging him with murder. He was convicted of manslaughter, and sentenced accordingly. There was evidence at the trial of the following circumstances attending the homicide: Defendant and the deceased, one L. G. Brown, lived in a small house belonging to defendant, and together followed the business of making shakes in the adjacent forest. Deceased was about seventy years of age, and in infirm health. Defendant was thirty-six years old. The time was about nightfall. Two other persons—Bradley and Woods—came in to visit defendant at his house, and sat down with him at supper. Said Brown got up from a bunk where he was lying, in the same room, and in an insolent manner inquired of Bradley his name, and his business there. Defendant resented this, and rose from the table, and laid hands on Brown, and shoved him down, at the same time applying to him an opprobrious epithet. As Brown fell, his head struck against the bunk and the wall of the room. He arose, and stabbed defendant in the abdomen with a pocketknife having a blade four inches long. Defendant exclaimed, "Boys, I am cut!" and went out the back door of the house, followed by Bradley and Woods. After making some examination of the wound, defendant took up a shovel, and started as if to return to the door whence he had come out, but Bradley took the shovel from him. He and Bradley then went and sat down on a porch in front of the house, defendant complaining of sickness from the effect of the wound. At this time Brown came out of the front door upon the porch, with the knife in his hand. Bradley sprang up, and approached Brown cautiously, and placed his hand on him, saying, "Keep back, Mr. Brown." The latter said nothing, and Bradley

turned for the purpose, as he testified, "of grabbing the defendant." This effort failed, and at the same instant defendant seized a heavy club and struck Brown therewith on the head, from the effect of which blow Brown died a few hours later. Woods came from the rear of the house just as Brown received the blow. After deceased was struck, he was taken into the house and placed in his bunk. Although insensible, he sat up, and defendant pointed a rifle at him, saying: "Get out of the way. Let me shoot him." Defendant also threw a coffeepot and a teapot at him, which, however, failed of their mark. From the time of the first altercation until the final blow, about five minutes elapsed. A stick of wood was admitted in evidence after identification as the club with which defendant struck the deceased. Most of the matters above stated appear from the testimony of Bradley and Woods, who were called as witnesses by the prosecution. On cross-examination, each of them said that at the coroner's inquest, held the day after the homicide, he had testified that the killing was in self-defense. Woods admitted also that he testified on the same occasion that deceased was advancing upon defendant when the latter struck the fatal blow. On the morning following the homicide, defendant was heard to remark that he would as soon kill such people—referring to Brown—as a rattlesnake. Defendant was sworn as a witness in his own behalf, and gave testimony more favorable to himself, in some particulars, than that of the witnesses for the prosecution. Thus, he stated that Brown lunged toward him at the time he struck him with the club; that the stick he used was smaller than that admitted in evidence, etc. In rebuttal the court admitted testimony that defendant's reputation for veracity was bad, to which evidence defendant objected that his own testimony was in harmony with that of the prosecution, and that the purpose of the rebutting evidence was to prejudice the minds of the jury against him, and not to impeach his credibility. The court refused an instruction to the jury, asked by defendant, to the effect that from the fact alone of the admission in evidence of the club with which, the prosecution claimed, Brown was killed, the jury were not permitted to infer that the fatal blow was struck with a club, or that the club admitted in evidence was the identical instrument used to strike such blow.

1. Defendant's chief contention on appeal is that the evidence showed the homicide to have been committed by him in necessary self-defense. Stress is laid on the statements to that effect made by the witnesses Bradley and Woods at the inquest, and which found admission into the evidence at the trial. Obviously, those statements were but opinions upon an ultimate fact, which was for the sole determination of the jury, and were not competent as direct evidence—much less, controlling. Defendant having been the first aggressor, even though his first assault on the deceased was not felonious, it was incumbent on him really and in good faith to decline further struggle, before he could invoke the right of self-defense to excuse the killing of his adversary: Pen. Code, sec. 197, subd. 3; *People v. Hecker*, 109 Cal. 451, 464, 30 L. R. A. 403, 42 Pac. 307; *People v. Robertson*, 67 Cal. 646, 8 Pac. 600. It is true that, on receiving the knife wound, defendant retreated from the scene of the first difficulty; but the occurrences which followed made a question proper for the consideration of the jury—whether he had in good faith abandoned the combat initiated by himself, or whether he continued to be ready and desirous to renew it on the first opportunity. It was shown that he indicated such desire very quickly after he withdrew from the house, but was prevented by Bradley's disarming him of the weapon he had obtained. So the transaction on the porch has similar significance. Bradley (who, though testifying apparently with fairness, seems to have been well affected toward defendant) first sought to restrain Brown, approaching him cautiously (a circumstance tending to show that Brown was making no haste), and then turned at once to take hold of the defendant, who was in the act of seizing the club. It was not an unnatural inference from the evidence that fresh violence seemed to Bradley, and really was, more imminent from defendant than from Brown—an inference which defendant's subsequent acts and declarations of revengeful animosity toward Brown tended to confirm. We are satisfied that the verdict was sustained by the evidence.

2. There was no error in admitting rebutting evidence to show defendant's bad reputation for truth: *People v. Hickman*, 113 Cal. 80, 87, 45 Pac. 175. Without deciding whether the special objections urged, viz., that the testimony of defendant was substantially the same as that of the witnesses pro-

duced against him, would, if true, vary the case, it is enough to say that the record does not sustain that position.

3. As to the refusal of the court to give the said instruction, counsel for defendant says, "This error is too plain to require argument," and accordingly no argument is advanced to support the contention. Thus left without suggestion which might possibly have induced a different view, we conclude, upon consideration, that the instruction was wholly inappropriate to the state of the evidence, and could have afforded the jury no light. It was undisputed that deceased was struck with a club, and there was testimony tending to show that the exhibit in evidence was the weapon used to strike him. As well have isolated any other single item of evidence, and have told the jury that from the fact alone of its admission they were not permitted to draw a conclusion which, viewed in its proper connection with other facts, it tended to establish. The judgment and order appealed from should be affirmed.

We concur: Belcher, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

AIKMAN v. SANBORN et al.

L. A. No. 370; March 30, 1898.

52 Pac. 729.

Vendor and Vendee—Rescission.—The Fact That a Vendor of land fails to perform his contract, or puts it out of his power to perform it, does not amount to a rescission, but is only ground for rescission by the purchaser.

Vendor and Vendee—Rescission.—Even if a Vendor of land by his own act has put it out of his power to comply with the contract, or has been guilty of such a breach of it that he could not enforce it, the purchaser cannot rescind, if he was first in default.¹

¹ Cited with approval in *Frank v. Bauer*, 19 Colo. App. 452, 75 Pac. 932, a suit for royalties, in connection with mining properties.

Cited and approved in *Jennings v. Dexter, Horton & Co.*, 43 Wash. 306, 86 Pac. 578, where the court says: "A party so in default will not be allowed to rescind a contract."

Vendor and Vendee.—In an Action for Money Paid by Plaintiff on a contract for the purchase of land, a recovery can be had only against the person to whom it was paid, and not against a third person, who took a conveyance of the land, and assumed his grantor's contract with plaintiff, as such action is based, not on the contract of purchase, but on the proposition that the contract has been rescinded, and that the vendor has money paid to him without consideration.

Vendor and Vendee.—The Vendor Does not Rescind the Contract by Insisting that the purchaser, by failing to make payment as he agreed to in his covenant, forfeited all payments made and his rights under the contract.¹

Liquidated Damages for Breach of Contract to Convey.—Under Civil Code, sections 3387, 3389, which provide that a contract otherwise proper may be specifically enforced, though a penalty is imposed, or the damages are liquidated for its breach, as it is presumed that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation, the parties may agree to stipulated damages in contracts for the purchase of land.²

APPEAL from Superior Court, Los Angeles County.

Action by William Aikman, administrator, against John P. Sanborn and another. From a judgment for plaintiff and an order denying a new trial defendants appeal. **Reversed.**

Works & Lee for appellants; C. L. Batcheller for respondent.

PER CURIAM.—This is an action to recover \$866.66 paid by plaintiff's intestate to John P. Sanborn upon a contract for the purchase of land in the county of Los Angeles. After the contract had been made, Sanborn conveyed the land to Murphy, who expressly assumed all the obligations of Sanborn's contracts. Sanborn was not served with process, and Murphy is practically the only defendant. The contract was made February 7, 1888. The purchase price was \$2,600, payable in three equal installments—one, at date of contract; the second, February 7, 1889; and the third, February 7, 1890. The contract contained this stipulation: "That time shall be considered the essence of the contract, and if default shall be

¹ Cited and approved in the somewhat similar case of Foxley v. Rich, 35 Wash. 178, 99 Pac. 672.

² Cited in the note in 108 Am. St. Rep. 61, on agreements purporting to liquidate damages.

made in the payment of any installment of principal or interest, or in payment of taxes, when the same shall become due, then the whole of said principal and interest shall be due and payable, or this agreement may be rescinded, at the option of John P. Sanborn, his heirs, representatives, or assigns, and said John P. Sanborn, his heirs, representatives or assigns, shall have the right to re-enter upon said premises, and each and every part thereof, and all payments which shall have been made under this agreement by the purchaser shall be forfeited, and be retained as liquidated damages." The property sold was described as lots 1, 2, 9 and 10, block 41, "according to the East Whittier townsite acreage property," a map of which Sanborn agreed to put on record. John Aikman, plaintiff's intestate, died August 10, 1889. He made no payments except the first, which was at the date of the agreement. He had then been in default since February 7, 1889. October 5, 1889, Sanborn conveyed the entire tract, of which the land sold to Aikman constituted a part, to Murphy, upon the condition heretofore stated. Neither plaintiff nor his intestate ever paid or offered to pay the balance of the purchase money due after the first payment. Neither Sanborn nor his assignee have ever refused to perform the agreement made, nor are they in any default in respect to the said agreement. The purchaser did not take possession of the land. The suit was commenced November 1, 1894, without any offer to pay or any demand for a deed. Indeed, even at the trial the present owner of the land offered to convey to plaintiff upon payment as specified in the contract.

It is contended that Murphy rescinded the contract by failing to file the map according to which plaintiff's intestate purchased, and by causing the townsite to be resurveyed so as to make some changes in the street. But if Murphy failed to perform his contract, or put it out of his power to perform, this did not of itself make a rescission. It only authorized Aikman to rescind, provided he was not himself in default. I know there are cases in which such conduct on the part of a vendor has been called "rescission," but it is obvious that such remarks are merely careless expressions; for in such cases the party not at fault may usually either deem the contract rescinded, and recover sums paid on it in an action for money had and received, or he may sue on the contract to recover damages for the breach. But, conceding

that the vendor had by his own act put it out of his power to comply with his contract, or had been guilty of such a breach of it that he could not enforce it, the purchaser could not rescind, for he was first in default. But in no event could he recover from Murphy money paid to Sanborn. The action is not based upon the contract, but upon the proposition that the contract has been rescinded, and, being non-existent, the vendor has money which was paid to him without consideration; therefore, having money in his hands which belongs to the plaintiff, such action will lie. Had the purchaser not been in default, he, upon a tender to Sanborn, could, if Sanborn did not or could not comply with his agreement, have elected to rescind, and thereupon could have maintained such a suit against Sanborn, or he might have sued Sanborn for damages. A class of cases is cited here which, it is contended, hold that when, under a contract like this, the vendor insists upon the very terms of his contract—that is, claims that the vendee, by failing to pay, has, according to his covenant, forfeited all payments made, and his rights under the contract—he thus rescinds. It cannot be that, when one insists upon his stipulated rights under a contract, he indicates an intention not to be bound by it, and these cases must not be so understood: *Merrill v. Merrill*, 103 Cal. 287, 35 Pac. 768, and 37 Pac. 392. As we read the code, it expressly recognizes the right to agree to stipulated damages in agreements for the purchase of land (Civ. Code, secs. 3387, 3389); but even under the doctrine of *Drew v. Pedlar*, 87 Cal. 443, 22 Am. St. Rep. 257, 25 Pac. 749, the vendor has not consented to a rescission in this case. He has never declined to perform his contract. The judgment and order appealed from are reversed.

HOLZHEIER v. HAYES et al.

L. A. No. 260; April 1, 1898.

52 Pac. 838.

Covenants.—In an Action for Breach of Covenant in a Deed, the complaint alleged a certain money consideration, upon which issue was joined, the answer alleging the consideration to consist of certain contracts between the parties, which contracts plaintiff had violated. The findings of fact showed a contract resembling the one set up in the answer, and that plaintiff had violated it; but there was no finding whether the deed rested for its consideration on the payment of money as alleged by plaintiff, or on the contract set up in the answer, though there was evidence touching this issue. Held, that a judgment for defendant was not supported by the findings.

APPEAL from Superior Court, San Diego County; W. H. Clark, Judge.

Action by F. A. Holzheier against J. C. Hayes and another. From a judgment for defendants, plaintiff appeals. Reversed.

D. L. Withington and J. P. Pearson for appellant; Daney & Wright, for respondents.

BRITT, C.—Action to recover damages for alleged breach of covenant in a deed of lands. It was alleged in the complaint that the conveyance was made in consideration of the sum of \$700 paid by plaintiff. In their answer, defendants did not deny the execution of the deed, or that it contained the covenant alleged, or that the covenant was broken; but they denied that the conveyance was made in consideration of the sum of \$700, and averred that the only consideration therefor was a certain contract described in the answer, made between plaintiff and defendant Hayes, which contract provided, among sundry other things, for the conveyance of said lands by said Hayes to plaintiff; and it was further averred that plaintiff had violated such contract in certain particulars specified. The findings contained a detail of facts showing a contract or contracts—partly in writing, partly oral—between plaintiff and defendant Hayes resembling the contract alleged in the answer. It was found that plaintiff had committed a

breach thereof, and judgment was rendered for defendants. There was no finding on the ultimate issue made by the pleadings, whether the deed on which plaintiff sues rested for its consideration on the payment of money alleged by plaintiff, or on the contract with one of the defendants, as they averred; nor were probative facts found, on which an answer to such ultimate issue can be said to follow as a necessary conclusion. The findings themselves show that evidence touching this issue was before the court, within the rule of *Himmelman v. Henry*, 84 Cal. 104, 23 Pac. 1098. The judgment should therefore be reversed and the cause remanded for a new trial: *Kennedy v. Berry*, 52 Cal. 87; *Bull v. Bray*, 89 Cal. 286, 13 L. R. A. 576, 26 Pac. 873. The record is not in condition to permit an expression of opinion on what we may surmise to be the merits of the controversy. This much is virtually allowed by counsel on both sides, but, it is scarcely necessary to add, they differ as to what are the merits.

We concur: Searls, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is reversed and the cause remanded for a new trial.

JACKSON v. PUGET SOUND LUMBER CO. et al.

S. F. No. 928; April 8, 1898.

52 Pac. 838.

Court Commissioners.—An Order was Made Transferring an Action “to W., court commissioner of this court, for an accounting; said court commissioner to report back to this court the evidence taken, and the balance found due.” Held, that this was a reference to the court commissioner officially, and not as referee.

Court Commissioners.—The Powers of Court Commissioners as prescribed by Code of Civil Procedure, section 259, cannot be enlarged by consent.

APPEAL from Superior Court, Fresno County; E. W. Risley, Judge.

Action by Alex. Jackson against the Puget Sound Lumber Company and another. From a judgment in favor of plain-

tiff, entered upon the report of a court commissioner, defendants appeal. Reversed.

L. L. Corey for appellants; Geo. E. Church for respondent.

CHIPMAN, C.—This action was for money had and received. Defendants denied all indebtedness, and set up a counterclaim alleging that plaintiff was indebted to defendants for goods, wares and merchandise. When the case came on for trial the court made the following consent order: “. . . . That this action be, and it is hereby, transferred to Stuart S. Wright, Esq., court commissioner of this court, for an accounting; said court commissioner to report back to this court the evidence taken, and the balance found due on said accounting.” The parties appeared before the commissioner, and introduced evidence; all objections thereto, of which there were several, being reserved and not passed upon by him. After the evidence was concluded and submitted, and before his decision or report, he tendered his resignation as court commissioner, which was accepted. Some time thereafter he filed his findings of fact and conclusions of law, and found a balance due plaintiff from defendants of \$1,300, with interest and costs. Upon the filing of the report and findings of the commissioner, and the same day, the court ordered judgment entered “in accordance with the findings of the referee” (sic); and thereafter, without notice to defendants, the clerk entered judgment against them for \$1,603 and costs. Defendants in due time filed objections to the report on the grounds: (1) Insufficiency of the evidence; (2) that at the time the report and findings were filed the commissioner had ceased to be such officer. And defendants further “excepted to certain errors of law occurring at the trial before said commissioner, and excepted to, as shown by the record of the proceedings had and testimony taken before said commissioner, transcript of which was also filed by said commissioner at the time of filing said report with the clerk.” Defendants also moved the court to vacate and set aside the report and the judgment for various reasons, one of which was that the commissioner, being a judicial officer and having resigned his office, had no authority to take any steps in the matter subsequent thereto. In the opinion filed by the court it was held that the order of reference was to Wright as a referee, and not as court

commissioner, and therefore it was immaterial whether he resigned his office of court commissioner or not. The court held that the referee went beyond his instructions in filing "findings and conclusions of law," as he was only directed "to find the amount due on said accounting"; and, as the judgment was based on these findings and conclusions, the court set it aside, and held that he would treat the findings as part of the report, and part of the direction "to find the balance due," and as to all other matters in the findings he would disregard them. Later on, plaintiff's attorney gave notice that he would present to the court, "for his signature, findings of fact in the above-entitled action, copy of which is hereto annexed, and ask for judgment accordingly." The matter came on for hearing at that time, and the court adopted the proposed findings and conclusions of law, and entered judgment for plaintiff for \$1,300, the amount found by the commissioner or referee to be due. The findings follow those of the commissioner, adding one covering the issue presented by the defendants' counterclaim.

Respondent suggests that appellants had an opportunity at this hearing to submit further evidence, and, not having done so, cannot complain. But the court distinctly adopted the report as to the balance found by the commissioner, and stated that it was only as to other matters that the parties might "take such further steps as they may be advised." The vital issue was this very balance which the court held was concluded by the reference. It cannot be doubted but that the trial court took the correct view of the powers of a court commissioner. Such commissioner has no authority to take proof, and report his conclusions thereon, as to any issue of fact raised by the pleadings, and such issue was so presented in this case: Code Civ. Proc., sec. 259, subd. 2. The commissioner must look alone to the statute for his power to act: *Quiggle v. Trumbo*, 56 Cal. 626. Nor could the authority or jurisdiction be conferred upon him as such commissioner by consent. The action was "transferred to Stuart S. Wright, court commissioner of this court; *said court commissioner* to report back to this court," etc. In the opinion filed by the trial judge the above words in italics were omitted, and apparently overlooked, in giving a construction to the order. It seems to us, while it might be held, as the learned trial judge held, that the words "court commissioner," where the first

occur, were *descriptio personae*, we cannot so hold when we consider the language used later on in the order; for the direction is that said "court commissioner"—the officer, not said Wright, the individual—shall report back to the court. At the hearing before the commissioner, objections were made to evidence, and exceptions reserved. The commissioner, speaking of objections, said, "I am not passing on them, and let all objections go to the court." A deposition was read before him, and it was stipulated that all objections were to be presented to Judge Harris, to rule upon the deposition, when the matter came before him. It is probable that Judge Harris made the order of reference, while the matter was heard finally before Judge Risley. It seems to us that if Wright was a referee, with direction to report the balance found to be due, it became his duty, under such direction, which embraced the real issue presented by the pleadings, to pass upon all objections raised at the hearing before him, and he should have made findings and conclusions of law as showing the basis of his balance found to be due: Code Civ. Proc., sec. 643. However this may be, the fact is that the report was made by a court commissioner, and the reference was made to him in his official capacity; and it was error to treat it as the report of a referee, and to adopt the balance found by him as conclusive upon the court. The utmost that the court could do, under the circumstances, was, with the consent of all parties, to try the case on the evidence reported; and this may still be done, if the parties are so minded, or with the right to either party to introduce further testimony. As the commissioner exceeded his powers, it becomes immaterial whether he reported before or after his resignation. It should be observed that the order of reference, considered as made to a referee, is not free from obscurity. The court referred to it as made under section 639; but that section relates to orders made by the court without the consent of the parties, while the order shows that it was a consent reference, and was probably intended to come within the provisions of section 638. Defendants apparently regarded the reference as made to the court commissioner, under section 259, while plaintiff and the commissioner seem to have regarded it as something different from the view taken by the court or defendants. We are unable to discover any theory upon which the proceedings can be upheld, and therefore recommend that the judg-

ment and order be reversed, with leave to the parties to proceed further as they may be advised.

We concur: Haynes, C.; Britt, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are reversed, with leave to the parties to proceed further as they are advised.

GRANT v. DREYFUS.

L. A. No. 323; April 9, 1898.

52 Pac. 1074.

Appeal.—Verdict by a Jury on an Issue as to Whether an account-book on which plaintiff based his claim was one of original entry or a fraudulent fabrication is one of fact, and the verdict of a jury thereon will not be disturbed.

Contract.—A Newspaper Notice by a Keeper of a Pasture that he wanted every horse taken out as soon as possible, and, if not, the owner would be charged a certain amount per day, is sufficient to charge one who read the notice with the terms thereof, as under an implied contract.

A Witness may be Asked to Examine His Account-book to see whether it contains a statement of certain items, the entries having been made by another under his direction, as such testimony is not from memory refreshed by the book.

Evidence.—Where a Party was Notified to Produce a Letter sent him, a longhand copy thereof, shown to be such, is admissible, although not a fac-simile.

Leases.—In an Action by a Lessee on an Account for Pasturing stock belonging to lessor's son, evidence of the removal from the premises and sale by him of certain materials, which evidence related to the breach of a covenant of the lease, was inadmissible, there being no issue concerning any breach.

Appeal.—Where the Evidence as to Later Items in an Account not claimed to be barred by limitation justified a verdict for the amount rendered, the question whether earlier items were barred will not be considered.

Trial—Instructions.—Plaintiff, Being Under Contract to Pasture defendant's stock for an indeterminate period, notified him to remove his horses, or he would be charged a certain amount. Plaintiff's account charged both for horses and cows, but the former

charges were more than the verdict rendered in an action on the account. Held, that an instruction that defendant was notified to remove his stock, though too broad, was not injurious.

Trial—Instructions.—Under Code of Civil Procedure, section 1963, declaring a presumption that a letter duly directed and mailed was received in the regular course of mail, an instruction in the latter language is not objectionable as meaning that the jury were to accept as a fact that the letter had been received.

Lease.—Where a Lessee Denied That He Agreed Before making the lease to pasture horses belonging to the lessor's son free in consideration of their use, and the evidence tended to show that all the conditions of the lease were entered into prior to its execution, in an action by the lessee for pasturage, an instruction that an agreement reduced to writing is conclusively presumed to contain all its terms, in the absence of fraud or mistake, was applicable.

APPEAL from Superior Court, Santa Barbara County.

Action by Gerard Grant against Louis G. Dreyfus on an account. From a judgment for plaintiff, defendant appeals. Affirmed.

Richards & Carrier for appellant; B. F. Thomas for respondent.

CHIPMAN, C.—Action to recover a balance of \$1,773.94, alleged to be due to plaintiff from defendant on an account for wood, for services, and for pasturage. Defendant pleaded the general denial, the two year statute of limitations, and affirmatively set up an agreement that the stock for which pasturage was charged was to be pastured free in consideration of their use. The pleadings are verified. Defendants also offered to confess judgment for \$147.79. The trial was by jury, and plaintiff had a verdict for \$598.89. The appeal is from the judgment and is presented by bill of exceptions.

1. Defendant claims that the evidence is insufficient to support the verdict and judgment. Most of his brief is devoted to the claim that the account-book of plaintiff is not a book of original entry, but is a fabrication. The proof of plaintiff's case rested upon the integrity of the entries in this book. There was practically no evidence independent of the book itself in support of plaintiff's claim. The items of charge in the book begin as early as December 1, 1890, and run down to June, 1895. Defendant introduced certain dealers in stationery to prove by a cost mark found in the book that it

came from their store, and could not have been bought by plaintiff earlier than August, 1893, which, if accepted by the jury as true, would have wholly discredited and impeached plaintiff's evidence. Plaintiff and his son disagreed as to which of the two purchased the book, and neither of them could remember from whom it was bought, but they both testified that the book was purchased at the time the accounts were opened, and that the entries were made at the time of the various transactions, and were correct; and there was some corroborating evidence. The facts were submitted to the jury, and we cannot now undertake to pass upon the conclusion reached.

Defendant endeavors to show that by applying the statute of limitations to the items prior to June 1, 1893, the verdict is in excess of the items proved even by the book. The account shows items subsequent to June 1, 1893, amounting to \$1,339.29. Defendant made tender of \$147.89. The jury might not only have rejected the items barred by statute, but greatly reduced the total of the other items, and there would have remained enough to account for the verdict. We do not see how this court can revise these figures.

2. Certain errors are assigned in admitting and rejecting evidence.

(a) Plaintiff published the following notice in the "Daily Independent" of March 30, 1894:

"Notice.

"G. Grant wants every horse taken out of Eagle canyon pasturage as quick as possible, and, if not, the owner will be charged fifty cents a day.

"G. GRANT."

This notice was published daily until April 9th, inclusive. Defendant admits that he saw it. Plaintiff wrote defendant April 5th, requesting him to take his horses out of the pasture, or it would cost him fifty cents per day from April 1st. This letter was addressed to defendant, and was mailed, postpaid, on the day after its date. Defendant denies receiving it. The objection to the published notice was that it was too indefinite to be the basis of an implied contract to pay the price named, that no time was fixed for removing the horses, and the notice was not addressed to defendant. We think the notice conveyed very clearly to anyone who read

it that plaintiff desired the removal of all horses at once, and, unless removed, a charge of fifty cents per day would be made. It was not necessary, to make it effective upon defendant, that a precise date for removing the animals should be given, or a precise date from which the charge of fifty cents per day would be made, nor that it should be specially addressed to defendant. Others had stock in pasture with plaintiff. It is in evidence that the season was very dry, and the feed short. The verdict of the jury shows that they did not allow all the charges from April 1, 1893. The jury must have deducted a large sum from these items, based upon pasturage after April 1st. We see no error in admitting this evidence.

(b) Plaintiff was asked to examine page 45 of his account-book, "to see whether it contains a statement of the wood sold to defendant, for hay," etc. The objection made was that the witness could not refresh his memory by a writing not made by himself, it appearing that his son, and not he, made the entries. It was in evidence that plaintiff's son made the entries under plaintiff's direction. Besides, plaintiff did not testify from memory refreshed by the book.

(c) Objection was made to the copy of the letter or notice of April 5th, mailed to defendant by plaintiff, because no proper foundation was laid for its admission. It appeared that plaintiff's son wrote and mailed the letter. He copied it in the account-book, and defendant had been called upon to produce the letter sent him. We do not see why a longhand copy of a letter may not serve the same purpose as letter-press copies, which latter are admissible. It might not be as satisfactory, but, if it is shown to be a copy, there can be no objection to it because not a fac-simile. Farmers seldom keep letter-presses, and, unless a copy such as this is admissible, they could not protect themselves by keeping copies of letters in the old-fashioned way.

(d) Objection was made by defendant to certain questions relating to the removal from the ranch by plaintiff of certain fence panels, and their sale by him. Plaintiff was lessee of a ranch formerly owned by defendant's father, then deceased, and now the property of his surviving widow. This evidence had some relation to the question of breach of covenants of the lease, as much other testimony also did; all of which it seems to us, was wholly irrelevant, whether introduced by plaintiff or defendant. There was no issue in the pleadings

concerning any breach of the lease which could relate to the removal of fence panels claimed by plaintiff. At the same time we are not able to discover that defendant was injured by this evidence, and we cannot see wherein it could have had any influence one way or another upon the jury. There are some other errors assigned in rulings upon the admission of evidence for plaintiff, but we find none calling for further notice.

3. The court gave five separate instructions at the request of plaintiff, to all of which defendant objected, and now urges error as to two of them. Instruction numbered 3 is specially assailed as error. It is as follows: "I charge you also, as a matter of law, that, where stock are pastured without any agreement as to length of time, they shall remain in pasture, or as to time when the pasturage should be paid, that the said contract of pasturage is a continuous contract, and the statute of limitations would not bar an action for the price of such pasturage until two years after the stock are removed." Defendant claims that in a contract to render services such as pasturage, where there are no predetermined limits as to time, each day gives a right of action, and plaintiff might have sued defendant while the animals were yet in pasture, and at the utmost the contract would be presumed to mature at the end of each month, the rate of compensation being ordinarily reckoned by the month, and the duration of contracts being determined by the time for payment; citing *Davis v. Gorton*, 16 N. Y. 255, 69 Am. Dec. 694; *In re Gardiner*, 103 N. Y. 533, 57 Am. Rep. 768, 9 N. E. 306. But we do not pass upon that question, for the reason that the evidence before the jury of items in no wise affected by the statute of limitations or claimed to be so affected, justified a verdict for not less than the amount given.

4. Instruction No. 4 informed the jury that plaintiff notified the defendant to remove his "stock," etc., whereas the notice related alone to "horses." The account charged both for horses and cows at fifty cents per day, and appellant claims that this made a difference of \$170. But the account for horses alone amounted to nearly \$1,000. We cannot see that appellant was injured, even if we assume that the instruction was broader than the notice. The instruction also stated that "a letter duly directed and stamped and mailed is presumed to have been received in the regular course

of mail." Appellant claims that this instruction in effect conveyed to the jury the meaning "that they were to accept as a fact that the letter had been received." We do not think that the instruction is susceptible of this meaning. Section 1963 of the Code of Civil Procedure declares that certain presumptions are satisfactory if uncontradicted, one of which is (subdivision 24) "that a letter duly directed and mailed was received in the regular course of the mail." The instruction is in the form of the statute, and, if the defendant would have had the jury determine whether the presumption had been overcome by any evidence on his part, he should have requested an instruction to that effect.

5. The fifth instruction was that an agreement reduced to writing is conclusively presumed to contain all its terms, in the absence of fraud or mistake. It is claimed that, while good enough law in the abstract, it had no application to the case. Appellant claimed that respondent agreed with Isadore Dreyfus, from whom respondent leased, to pasture the stock for their use. The written lease is in evidence, and took effect November 1, 1891. The preliminary talk as to its conditions was in May, 1891, in which month Isadore Dreyfus departed for Europe, and there died. There was evidence tending to show that there were no conditions of the lease entered into after its execution; they were all prior thereto. Under the pleadings and evidence it would seem that the instruction had some application to the case. Respondent denied any agreement to pasture appellant's animals for their use. The fact was at issue, and it seems to us quite improbable that Mr. Dreyfus would have omitted this agreement from the lease if such agreement existed at the time the lease was made. If it was a condition of the lease, it should have found its way into the written document, and, not having done so, the instruction seems to us appropriate as well as good law. Other assignments of error do not appear to call for notice. It is recommended that the judgment be affirmed.

We concur: Searls, C.; Haynes, C.

PER CURIAM—For the reasons given in the foregoing opinion the judgment is affirmed.

SMITH v. THOMAS.

Sac. No. 362; April 9, 1898.

52 Pac. 1079.

Elections—Illegal Votes.—Testimony by the Inspector of Elections and the ballot clerk that they did not see a mark of identification on a ballot when they were counting them is sufficient to support a finding that such mark was placed thereon after it came out of the ballot-box.

Elections—Illegal Votes.—Under Code of Civil Procedure, section 1116, prohibiting the introduction of testimony of illegal votes in an election contest unless the contestant deliver to the defendant, at least three days before trial, a written list of the votes which he intends to prove were illegal, evidence as to the illegality of a vote is properly excluded which did not appear on the list served on the defendant, although it did appear on a list served by the defendant on the contestant.

Elections.—The Legality of a Vote, in an Election contest will not be determined where it was not claimed to have been cast for plaintiff, and it was not counted for defendant.

Elections—Residence of Voter.—A Wood-chopper, Who had No Home, but who made a particular place in a ward his home whenever in town or out of work for five years past, and who was sent there when sick, and who never voted in any other place for eleven years, is a legal voter in such ward.¹

APPEAL from Superior Court, Tulare County; Wheaton A. Gray, Judge.

Action by M. W. Smith against J. W. Thomas. From a judgment for defendant, plaintiff appeals. Affirmed.

Power & Alford and Hannah & Miller for appellant; C. G. Lamberson and W. B. Wallace for respondent.

¹ Cited with approval in *State v. Savre*, 129 Iowa, 128, 113 Am. St. Rep. 452, 3 L. R. A., N. S., 455, 105 N. W. 389. In that case the court said, of an unmarried man who ate in one place and slept in another, but declared he intended to make the place where he ate his voting place: "A person cannot live in one place, and by force of imagination constitute some other his place of abode. The intent and the fact must concur. . . . The home of an unmarried man is where he has his rooms in which he keeps such personal effects as he has, where he rests when not at work and spends his evenings and Sundays."

PER CURIAM.—Plaintiff brought this action to contest the right of defendant to exercise the office of supervisor of the county of Tulare, for supervisor district No. 3 therein, for the term commencing January 4, 1897, to which said office defendant had been declared elected by the board of supervisors. The court found that three hundred and forty-six votes were counted by the board of election of the several precincts for defendant, and three hundred and forty-two votes for plaintiff, and that the board of supervisors thereupon canvassed said votes and the returns, and properly certified and declared defendant duly elected, and issued to him a certificate of election. The result of the trial was, and the court found, "that plaintiff and defendant each received and were entitled to have counted for them three hundred and forty-three legal votes cast at said election," and, as conclusion of law, "that plaintiff take nothing by this action." The appeal is from the judgment, and is presented by bill of exceptions.

1. Appellant's first point arises from a certain ballot which it is claimed was erroneously counted for defendant. In the body of the ballot nothing irregular appears. Opposite the name of defendant is a cross stamped in its appropriate place. Above the printed matter on the ticket, in the open space at the right-hand top, and about opposite the words "General Ticket," are two crosses, apparently stamped with the same ink and stamp as used by the voter, and an ink blotch of same color (red) apparently made with some sort of stamp or the end of some kind of implement round in shape, and about the size of a silver five-cent piece. This impression may have been made with the reverse end of the stamp. The disk is not entirely covered with ink. Appellant objected to the ballot upon general grounds, and specially because it bore upon its face distinguishing marks (above described), which were placed there with the intention of fraudulently designating the choice of the voter casting the ballot. The trial court, after taking the evidence of the election officers as to the condition of the ballot at the time it was taken from the ballot-box, and also after taking the evidence of the custodian of the package of ballots subsequently to that time, held as a fact that said ballot was not marked upon when it came out of the ballot-box, but subsequently thereto, and ordered it counted for defendant. The evidence is not at all clear and convincing in support of this finding of the trial court. At

the same time, there is sufficient evidence to support it. Hamrick, an inspector at the election, testified: "I was an inspector of election in the Fourth ward precinct, and I inspected the ballots closely, and strung them after they were counted. I observed all the ballots very closely as I strung them. I saw no marks upon any of the ballots. I did not see any ballot marked as 'Defendant's Objection No. 3' is marked. I wore my glasses and I think I would have seen any ballot marked as this one is." Douglas, a ballot clerk, also testified: "I was a ballot clerk. I sat behind Mr. William Kettner while he was calling off the ballots. I did not see any such ballot as 'Defendant's Objection No. 3.' If there had been such a ballot, I think I would have seen it. I was representing the Republican party, and observed the ballots closely. I got up from my chair behind Mr. Kettner two or three times, and talked with Mr. Kelsey, but I do not think that I missed any of the tickets." This evidence is sufficient to support the finding of fact made by the trial court.

2. Plaintiff called one McCloud as a witness to prove that he voted for defendant, and that his vote was illegal, for the reason that he was not upon the day of election, nor had he been for thirty days previous thereto, a resident of the precinct in which he voted, but was in fact a resident of a precinct included in another supervisor district. The defendant objected, on the ground that the name of this witness did not appear on any list of illegal voters served by plaintiff on defendant. It appeared that his name was on the list of illegal voters served by defendant upon plaintiff. The court refused to allow plaintiff to examine this witness, and this ruling is assigned as error. It is claimed by appellant that section 1116 of the Code of Civil Procedure changes the rule existing prior thereto when it was required to set out the names claimed to be illegal voters, in the pleadings, without which evidence of their illegality could not be offered: *Norwood v. Kenfield*, 30 Cal. 394. The section referred to provides among other things: "But no testimony can be received of any illegal votes unless the party contesting such election deliver to the opposite party, at least three days before such trial, a written list of the number of illegal votes, and by whom given, which he intends to prove on such trial; and no testimony can be received of any illegal votes except such as are specified in such list." We think this statute should be held

to mean what it says, and that it should not be extended to mean something else. If plaintiff desired to give evidence of the illegality of any votes embraced in defendant's list, he should have included them in his own list. The object of the statute is to put the opposite party upon notice that he (the contestant) intends to claim these votes to be illegal. His proofs must relate to those only of which he has given the statutory notice. Defendant had the right to assume at the trial that plaintiff would not attack any votes except such as he had included in his list.

3. Appellant presents in the testimony of one Stingley the very interesting and important question as to whether the declarations of a voter after he has voted can be received to contradict his testimony as a witness as to how in fact he did vote. The court ruled that he was not a legal voter in the precinct where he voted, and that he "did not vote for any candidate for supervisor." He testified that he voted for the defendant. We do not feel called upon to consider this vote, for the reason that it is not claimed that it was cast for plaintiff, and the court refused to count it for defendant. If there was error, it was without prejudice to appellant.

4. The remaining error claimed by appellant is in the finding "that one George Phoebus voted at said election in the Third ward precinct, but said Phoebus was a legal voter therein at said time, and voted for the defendant for the office of supervisor." The only testimony as to this vote was given by Phoebus himself. He testified in part as follows: "Whenever I came into town, I had one certain place to go to. I went there whether I had money or not. I made that my home. That was the Noel place. . . . I registered in the Third ward. . . . I never voted anywhere else than in Visalia for eleven years. . . . I never voted any place except in the Third ward in any years. . . . I have been a wood-chopper for eleven years. . . . When I was out of a job, I came back to Visalia, and went to Noel's to live. That has been my practice for over five years. . . . I took contracts. At the present time I am cutting by the cord. . . . I voted there (in the Third ward) because I considered I lived there. I intended to make Noel's my home. . . . I have been sick at Noel's three different times. If I got sick in the country, I was always taken to Noel's. I considered it the only home I had." We think the evidence was sufficient to

justify the finding of the court as to this voter. He belongs to a class of persons whose place of residence must be deemed to be in the city, town or village where they choose in good faith to establish it. Because this voter has not a home, such as wife and children can give, he should not be deprived of rights of the highest value to the citizen. The judgment is affirmed.

FOX v. HALE & NORCROSS SILVER MIN. CO. et al.*

S. F. No. 683; April 9, 1898.

53 Pac. 32.

Fraud.—In Charging Fraud, a Complaint must State the facts constituting the fraud—at least, in a general way; and such facts must be alleged with sufficient distinctness to enable the adverse party to come prepared with evidence on the general questions of fraud which will be raised.

Appeal—Retrial of Case.—When, on Appeal, the Judgment of the lower court is affirmed as to one cause of action, and reversed and remanded for a new trial as to another cause of action, all the issues involved in the cause of action remanded must be retried, though the appellate court deems the evidence sufficient to sustain the judgment of the trial court on one of the issues.

Fraud—Presumptions.—When Defendants are Charged with a fraudulent conspiracy for two purposes, and it is proved for one purpose, the presumptions are still in favor of the innocence of defendants of conspiring for the other purpose.

Fraud—Evidence.—Fraud cannot be Conjectured from the Fact that defendants have been guilty of other independent frauds. The evidence must be satisfactory, within the rule stated in Code of Civil Procedure, section 1833, defining "prima facie evidence" as that which suffices for the proof of a particular fact until contradicted and overcome by other evidence.

Fraud.—The Admissions of Questions and Answers of witnesses in evidence, which assumed that certain samples of ore were fair samples, and that assays thereof were fair assays, without proof that such was the case, when the question at issue was whether they were fair samples, and whether they were properly assayed, is error.

Pleading.—When the Complaint is Amended in Any material respect, so as to present new questions, on which issues may be taken, defendant may answer, as of course; and in such case the court cannot limit the defenses which may be interposed.

*For opinion on rehearing, see case following, post, p. 1005.

Parties—Fictitious Names.—Some of Defendants Were Sued by fictitious names, but the summons was personally served on them. The complaint was afterward amended so as to properly name defendants. Held, that defendants were made parties, within the statute of limitations, when the summons was served.

Appeal—Retrial of Case.—On the First Trial, Evidence was Taken of plaintiff's right to bring the action as a stockholder of a corporation, and the court found facts authorizing plaintiff to sue in behalf of the company. Defendants did not except to the sufficiency of such evidence, or present the question thereof on appeal. The case was affirmed on appeal as to a certain issue, and remanded for retrial as to another issue. Held, the findings being sufficient to show the right of plaintiff in that regard, that the issue as to the right of plaintiff to bring the action as stockholder was not open for investigation in the second trial, either as to the issue on which a new trial was denied, or as to that on which a new trial was awarded.

Appeal—Where a Judgment is Affirmed as to Certain Issues and reversed and remanded for a new trial as to other issues, it is a modification of such judgment, and such action is within the province of the supreme court.

APPEAL from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by M. W. Fox against the Hale & Norcross Silver Mining Company and others. Judgment for plaintiff. Defendants appeal. Reversed.

W. F. Herrin, Lloyd & Wood, Garber, Boalt & Bishop, Bishop & Wheeler, W. E. F. Deal and Ed. R. Taylor for appellants; W. T. Baggett, L. D. McKisick, E. S. Pillsbury and W. H. H. Hart for respondent.

TEMPLE, J.—This action was brought by plaintiff, as a stockholder in the corporate defendant named, against the corporation, the directors thereof, and various other persons, charging a fraudulent conspiracy between the directors and others to cheat and defraud the corporation. Among other preliminary allegations, the plaintiff charges that Hayward and Hobart were largely the owners of the stock in the Nevada Mill and Mining Company, and controlled and managed the Mexican Mill, and that they conspired with other persons to defraud the Hale & Norcross Silver Mining Company. For that purpose they procured the control of the last-named corporation, and, by certain practices set forth, caused certain persons named as defendants to be elected directors of

said corporation. It is charged that said directors were at all times controlled by said Hayward and Hobart in all official acts; that they all conspired to cheat and defraud the corporation by various cunning and fraudulent acts, practices, arts and devices, intending by them to have the effect of increasing their own gains at the expense of the corporation and its stockholders. Certain devices and practices are then stated, from which it is alleged damage resulted to the corporation. Without attempting to set them out, they may be indicated thus: (1) Refusing to report to stockholders assays of the ores taken from the mine, that the conspiracy and combination to defraud might be carried out more easily and successfully. (2) Mixing low-grade ores with the high-grade ores, to increase the amount of ore to be milled, and the profit of the mill, and for the purpose of hiding and concealing the true value of the high-grade ore. It is charged that the corporation suffered damage from this source to the amount of \$500,000. (3) They caused false and fraudulent assays to be made of the pulp at the mill. (4) The fourth is as follows: "As another of the acts, practices, arts and devices concocted in aid and furtherance of said fraudulent conspiracy and combination, the said persons and corporations as aforesaid, so controlling and directing the affairs and management of the said mills, and the agents and employees thereof, caused and directed all of said ores to be handled or managed by a fraudulent system of imperfect milling or reduction, intending thereby to leave in the tailings, slimes and residues a large portion of the gold and silver contained in said ores, which tailings, slimes and residues plaintiff is informed and believes were afterward worked over for the joint benefit of the aforesaid conspirators, and to the great damage and loss of the said mining company and its stockholders, to wit, about one million one hundred thousand (\$1,100,000) dollars." (5) Alleges excessive charge for milling. (6) The sixth alleges that six thousand tons of ore, worth \$280,000, were sent by the conspirators to the Chollar and Nevada Mills, which were wholly lost to the corporation. It is then charged that the directors, knowing all the acts, practices and devices of said conspirators to cheat and defraud the corporation, combined with said persons to cheat and defraud said corporation, and did cheat and defraud said mining company, "through said conspiracy, combina-

tion, acts, practices, arts and devices, of large quantities of bullion and money, the property of said mining corporation, to wit, about two million one hundred thousand dollars (\$2,100,000)."

All the material allegations were specifically denied by the appellant, but the court upon the first trial found in substance for the plaintiff upon all the issues. The only damage found, however, was for the overcharge for milling, and that resulting from the alleged fraudulent and imperfect milling of the ores. Upon the last-mentioned issue, as to the fraudulent and imperfect milling, the findings were as follows: "That the defendants Alvinza Hayward, W. S. Hobart, the Nevada Mill and Mining Company, and H. M. Levy, by and with the knowledge, consent, and approval of the defendant trustees, and for the purpose of consummating the fraudulent conspiracy and combination to cheat and defraud the Hale & Norcross Silver Mining Company and its stockholders, did cause and direct all of said ores to be handled and managed by fraudulent system of imperfect milling, whereby there was left in the tailings, slimes and residues of said ores a large portion of the gold and silver contained in said ores, which tailings, slimes and residues were the property of the Hale & Norcross Silver Mining Company, and a portion of which tailings, slimes and residues were afterward worked over by said conspirators, who took, carried away, and appropriated the gold and silver extracted therefrom for the benefit of themselves, to the damage and loss of the said Hale & Norcross Silver Mining Company and its stockholders." "That during all of the times from about March 1, 1887, until July 1, 1890, an unlawful and fraudulent combination and conspiracy existed by and between the defendants Alvinza Hayward, W. S. Hobart, the Nevada Mill and Mining Company, and H. M. Levy, and the defendant directors, and others, which unlawful and fraudulent combination and conspiracy was organized and conducted with the intent and for the purpose of wrongfully and unlawfully diverting valuable property, consisting of ores, residue of ores, and bullion, belonging to the Hale & Norcross Silver Mining Company and its stockholders, from said corporation and its stockholders, to the use and benefit of the members of said unlawful combination and conspiracy, and said unlawful and fraudulent combination and conspiracy, organ-

ized and conducted with the knowledge, consent and approval of the said defendant directors, for and during all the time that each was a director or trustee of said Hale & Norcross Silver Mining Company; and there was wrongfully and fraudulently diverted, taken, carried away and converted by said defendants, by and through said fraudulent and unlawful combination and conspiracy, valuable property, consisting of ores, residues of ores, and bullion, belonging to the Hale & Norcross Silver Mining Company and its stockholders, to the damage and loss of said corporation and its stockholders, in the sum of \$789,618, and the further sum of \$222,217, caused by the fraudulent, excessive and exorbitant charge for crushing and milling said ores, making an aggregate loss to the said Hale & Norcross Silver Mining Company of \$1,011,835. That all the defendants herein except the Hale & Norcross Silver Mining Company are, and were at various times between the first day of March, 1887, and the first day of July, 1890, members of the said unlawful combination and conspiracy."

An appeal from that judgment, and from an order refusing a new trial, was taken to this court by the present appellants and others; and a full statement of the facts of the case, and of the issues involved, may be found in the opinion then rendered: 108 Cal. 369, 41 Pac. 308. The effect and meaning of that decision and opinion are of prime importance in the determination of this appeal. The following is a summary of the conclusions reached and of the judgment rendered: "(1) That the defendants Hayward, Hobart and Levy formed a fraudulent combination and agreement for mining and milling the ores of the Hale & Norcross Silver Mining Company, but that the other directors of the mining company were not parties to this agreement, but were merely negligent in the performance of their duties, and are therefore chargeable only with such negligence, and are not chargeable with any actual fraud. (2) That the Mexican and Nevada Mills were under the control of Hayward, Hobart and the Nevada Mill and Mining Company, but that it is not shown that the Vivian Mill was under their control. (3) That Hayward, Hobart and Levy, with the acquiescence and consent of the officers of the Hale & Norcross company, controlled the affairs of that company. (4) That Hayward, Hobart and Levy, in pursuance of their agreement aforesaid,

caused a quantity of inferior and worthless ores to be extracted from the mine, and to be milled, after being mixed with ores of a higher grade. (5) That the Hale & Norcross company paid \$7 per ton for milling said ores; that the actual cost of milling the same was about \$4.50 per ton; that, by reason of their fraud as aforesaid, the said defendants were entitled to receive only the actual cost of milling said ores; that, by reason of having been required to pay \$7 per ton for milling said ores, the Hale & Norcross company had sustained damage in the amount of \$210,197.50. (6) That the evidence is insufficient to sustain the finding of the court that the Hale & Norcross company had sustained damage, by reason of the improper milling of the ores, in the amount of \$789,618, and that the actual amount of damage sustained thereby cannot be determined from the findings of the court. (7) That the Nevada Mill and Mining Company, not having been served with process, was not before the court as a defendant. The cause is therefore remanded to the superior court, with the following directions, viz.: The judgment appealed from is set aside, and the superior court is directed to enter a judgment, as of the date of its former judgment, against Alvinza Hayward and H. M. Levy, for the sum of \$210,197.50, with interest from that date, upon the issue presented by the claim for having paid an excessive price for milling the ore in the Mexican and Nevada Mills, and upon that issue the order denying a new trial as to these appellants is affirmed. As to the other appellants, except the Nevada Mill and Mining Company, the order denying a new trial as to this issue is reversed, and a new trial thereon ordered. Upon the issue presented by the claim for damages sustained by reason of the imperfect and fraudulent milling, the order denying a new trial is set aside as to all the appellants; and the court is directed, upon the evidence already taken in the case, and such other evidence as may be presented by either party, to make findings in accordance with the views hereinbefore expressed. Upon the amount, if any, of such damage sustained by the Hale & Norcross company, in addition to finding the value of the ore delivered to the mills, the court is directed to find the amount and value of the bullion that should have been returned therefor. The court should also find what amount of this value of the ore delivered to the mills was necessarily lost in working, or

would not, under fair milling, be separated from the baser matter, and also the amount of the money, if any, received by the mills from the working or sale of the tailings or residue of the ores."

From this it appears that the former judgment gave damages to the plaintiff only upon two claims made in the complaint: (1) For the difference between the charge for milling the ores and the actual cost; and (2) for damages sustained by reason of imperfect and fraudulent milling of the ores. As to the first of these, the order denying a new trial was affirmed. As to the second, the order was reversed, and a new trial granted, and upon that new trial the court was directed to find upon certain specific questions. The other issues, in regard to alleged frauds, from which no damage was shown or claimed to have resulted, were regarded as immaterial. The ground upon which this court sustained the finding as to the alleged excessive charge for milling the ores is plainly stated. It was, to restate it plainly and briefly, because it appeared that Hayward and Hobart, or their agents, had bribed Levy, the real manager of the mining corporation, to give the mills controlled by them the milling of the ores. They did control the mining corporation, as to that contract, and therefore their relation to the company was that of trustees, and they could not be allowed to make a profit out of a contract so procured. The corrupt arrangement entered into between Hayward and Hobart, on one part, and Levy, on the other, is called a "conspiracy," in the complaint, and also in the former opinion of this court, and a great deal seems to be made out of the epithet. It seems to be understood that it tends to prove a continued concert of action to cheat and defraud the mining corporation. The facts shown do not really establish a conspiracy. The whole arrangement—so far as the proof goes—at the worst, shows that the president, who was in fact sole manager of the corporation, was bribed to give them the milling of the ores. There is no proof that the arrangement between the defendants, bad as it was, went beyond this. If metal was by design sent into the tailings, to enrich them for the advantage of the mill owners, or if bullion was to be feloniously abstracted, Levy, so far as the proof shows, would not profit thereby; and this limitation upon the so-called conspiracy is clearly shown in the opinion rendered on the first appeal.

After calling attention to the fact that the contract was simply that Levy should share in the profits of the milling done by the mills controlled by Hayward and Hobart, the opinion proceeds to state how far the corrupting influences of this illegal contract would naturally go. It is said: "It is next contended that the finding to the effect that Hayward, Hobart and the Nevada Mill and Mining Company, in conjunction with the other defendants, controlled all the business affairs of the Hale & Norcross company, is against the evidence. This finding is material only so far as it relates to the mining and milling of the Hale & Norcross ores, and as to those matters the evidence fully warrants the conclusion that a majority of the directors were, as above stated, simply acquiescent or passive, and that Levy did as he pleased. Whatever inference, therefore, as to participation by the mill owners in the control of the mining company may be legitimately drawn from the existence of the unlawful contract for a division of the profits of the milling, or from the manner in which the ore was milled, or from an inadequacy of returns of bullion, or neglect of proper precautions in behalf of the mining company, is to be considered as a fact proved. Undoubtedly the existence of the contract supplied a motive to both parties to increase the amount of milling by the extraction of low-grade ores; and it may fairly be argued that it also offered an inducement to Levy to connive at a careless and inefficient system of milling, by which a larger number of tons would be milled at the same cost, and consequently at a larger profit. But proof of a motive to commit a wrong is scarcely sufficient, by itself, to prove that the wrong has actually been committed; and it remains to be considered whether there was any other substantial evidence of the mining of the low-grade ores, or of imperfect milling." According to the evidence, the understanding between Hayward, Hobart and Levy was that, if Levy would retire from the contest in the election of directors, he should have one-eighth of the profits of the milling of all ores from the mine which was done at their mills. Afterward it was conceded that he might be a director, and still retain his interest in the contract; and finally he became president and the sole manager of the mine and of the corporation. It is quite conclusively shown that all he did receive was a share in the profits of

milling the ore at \$7 per ton. There is nothing which even tends to show that there was a conspiracy to purloin the bullion, and divide profits so made. Nor is there any allegation in the complaint of any fraud of that character, or of damages so resulting. Yet the last judgment is necessarily and admittedly based upon that very proposition. It is conceded, as is also shown by the opinion of the learned judge of the trial court, that the amount of the judgment was reached in this way. The true value of the ore sent to the mill was estimated as nearly as practicable. The defendants were then given credit for the estimated value of the slimes and tailings (that is, of the residue after milling), also for an estimated amount of moisture in the ore. This was deducted from the estimated value of the ore, and the difference is the amount of bullion which should have been returned. Of course, if that value in bullion was obtained from the ore, and false returns were made, the portion not returned to the mine was stolen by someone. The judgment, in effect charges Hayward, Hobart and Levy with the larceny.

It is strenuously contended by the appellants that no such fraud is charged in the complaint, and no damage from any such source claimed. The finding, it is said, is not responsive to any issue made in the case. It is quite obvious that, so far as the pleadings are concerned, this position is sound. The charge of damage resulting from an alleged system of fraudulent and imperfect milling is specific. It was done with the intent of unduly enriching the slimes, tailings and residues, which it is charged were afterward worked over for the joint benefit of the conspirators, to the damage of the mining corporation in the sum of about \$1,100,000. This means, and was understood to mean, that the ores were intentionally so milled as to leave a large portion of the gold and silver in the residues, which by fair milling would have been extracted and returned to the mining company. Eliminate this charge, that the so-called conspirators purposely left a portion of the valuable metals in the residues, and there is no allegation in the complaint of any fraud with reference to the milling or of any resulting damage. Fraud is a conclusion of law, and, when made a ground of action, the facts constituting it must be stated. The law upon the matter is stated by Bliss, in his work on Code Pleading (section 211), as follows: "In alleging fraud, it will not suffice to say that the

party fraudulently procured or fraudulently induced or fraudulently did this or that, or that he committed, or was guilty of, fraud. The facts which constitute the fraud must be stated. Fraud is a conclusion of law. A statement that defendants in 'concert, did, by connivance, conspiracy, and combination, beat and defraud the plaintiff out of,' etc., does not state the facts that constitute the cause of action. It does not appear what they did. The legal conclusion—an epithet only—is applied to their acts, without knowing what they were. Fraud is not a fact. It is a name given by law to certain facts, to certain conduct of the accused party. The fact may be misrepresentation, deceit, specifically stated, and the term 'fraud' is the legal epithet applied to such facts. It is not the fact, not the thing done, but only a conclusion from the thing done. The term 'fraud' or 'misrepresentation' may not be used at all, if the facts appear." Unless the facts are stated—at least, in a general way—no cause of action is stated; and this court has ruled that the facts must be alleged with sufficient distinctness to enable the adverse party to come prepared with evidence upon the general questions of fraud which will be raised: *Capuro v. Insurance Co.*, 39 Cal. 123. See, also, *Taylor v. Bidwell*, 65 Cal. 489, 4 Pac. 491; *Herron v. Hughes*, 25 Cal. 556; *Gray v. Galpin*, 98 Cal. 635, 33 Pac. 725; *People v. McKenna*, 81 Cal. 158, 22 Pac. 488; *Meeker v. Harris*, 19 Cal. 279, 79 Am. Dec. 215; *Triscony v. Orr*, 49 Cal. 612. The answer to this proposition contained in respondent's brief is that this court at the former hearing declared "that there was an issue fairly and properly made by the complaint, which this court declared to be 'an issue presented by the claim for damages sustained by reason of the imperfect and fraudulent milling of the ores of the Hale & Norcross Mining Company by the defendants,'" and that the trial court was directed to take additional evidence and make findings upon that issue. This certainly is no answer to the argument. No one disputes that there is an issue made by the pleadings upon the claim for damages resulting from the alleged fraudulent and imperfect milling of ores. The question is, simply, What is that issue? No fraud or imperfection in the milling is charged, except that a portion of the valuable metals was purposely left in the ore, and sent into the tailings, to be, and which was, thereafter appropriated by the alleged conspirators. That the writer

of the former opinion understood that such was the issue presented by the pleadings, and which had been tried, and upon which a new trial was asked, clearly appears from the opinion. The issue is plainly so stated: "That said mill owners, in furtherance of the objects of the conspiracy, caused all of said ores to be handled by a fraudulent system of imperfect milling, intended to leave in the tailings, slimes and residues a large portion of the gold and silver contained therein, which tailings, slimes and residues were afterward worked over for the joint benefit of the conspirators, to the damage of said mining company and its stockholders in the sum of about \$1,000,000": 108 Cal. 381, 41 Pac. 310. Again, on page 400, 108 Cal., and page 317, 41 Pac.: "The next, and by far the most important, exception to the decision of the superior court, relates to the various findings to the effect that Hayward, Hobart, Levy and other defendants worked the ores of the Hale & Norcross company by a fraudulent system of imperfect milling, by which a large portion of their value was left in the slimes, tailings, and residues of the mills." The court then proceeds to consider at some length the evidence upon which the court had found that the ores had been fraudulently milled, and the damage ascertained, and finally says that the value of the silver bullion was incorrectly determined, and that for this reason alone a new trial must be had. Then occurs the passage, much relied upon by the respondents, as to the proper method of determining the damage. This amounts really to nothing more than the statement that, when the court shall determine the amount of bullion which should have been returned, the value of that wrongfully retained in the slimes and tailings should be estimated as stated. And the court proceeds to say that, since a new trial must be had upon the question of damages, it is unnecessary to discuss the evidence offered to corroborate the general charge of fraud in the milling, by showing how it was possible to debase the battery samples, or to run the value into the tailings by improper amalgamation, or to abstract the amalgam or the bullion; and the opinion proceeds: "All these things have their place as tending more or less to corroborate other evidence of improper milling, and are entitled to such weight as the trial judge may think belongs to them when considered with the more direct evidence of the assay value of the ores, the bullion returns made,

percentage that ought to be returned with correct milling." It is then stated that the trial court concluded that, inasmuch as the proper return of bullion was not made, a large part of the ore was improperly run into the tailings, and consequently the tailings did not belong to the mill company. All this clearly indicates that the court understood that a new trial was granted upon the entire issue as to damages claimed for fraudulent and imperfect milling, including the issue whether the milling was fraudulent and imperfect, as well as to the amount of damages. It must be remembered that "whether the evidence is sufficient to establish the fact is a question of fact, which must be determined by the tribunal to which it is submitted. A declaration by the appellate court that it does establish the fact would be outside of its functions, and would not be binding upon the trial court": Wallace v. Sisson, 114 Cal. 42, 45 Pac. 1000. Had the supreme court said that it was proven that there had been a fraudulent and imperfect milling of the ore, but that the amount of damage could not be ascertained, and therefore, as to the issue in which such damage was claimed, a new trial was ordered, the trial court would not be bound by the statement as to the facts, but would be required to try the whole issue.

The order refusing a new trial upon the issue raised upon the claim for damages alleged to have resulted from a fraudulent system of imperfect milling was reversed. This, of itself, granted a new trial upon that entire issue, and not as to the amount of damages only. The language of the judgment is sufficient to identify the issue upon which a new trial was granted, and that is all that was necessary. Upon a part of that issue (that is, as to the amount of damage, "if any"), the court was directed to find upon certain special matters. This itself was equivalent to saying that, if there had been a fraudulent milling of the ores as charged, and damage had resulted therefrom, then the court should find as directed. It was not intended to limit the inquiry to these matters, however. The required findings are probative, and all have a bearing, not only upon the amount of the damage, but upon the question as to whether the ores were fraudulently milled in order to run the gold and silver into the tailings for the advantage of the mill company. The court was directed to find, upon these points: (1) The value of the ore;

(2) the amount which would have been returned by fair milling; (3) what could not have been separated from the ore by fair milling; and (4) how much the defendants had realized by working over or selling the residues. All these inquiries have a direct bearing upon the question as to whether the ore had been fraudulently and imperfectly milled, with intent to enrich the tailings, slimes and residues; but it is difficult to discover any reason for requiring a finding upon all these matters, if the new trial was only to ascertain the amount of damage, and this was a direction as to how that was to be determined. Counsel for the respondent say that they do not know why the court was directed to find how much the defendants realized from working the tailings, unless that amount was to be added to the damages ascertained by the other process, by which the court found what ought to have been returned. Of course, that would have been absurd; for when the court determined the amount of metal in the ore, and how much was in the tailings, slimes and residues, and concluded that the difference showed what had been extracted, evidently there could be no further damage, if, as now found, the milling was perfectly done. It was not intended that the court should determine the damage by either any or all the processes indicated, to the exclusion of other methods; nor was it supposed or indicated that necessarily any question as to the amount of damage would be tried at all. Not only is the presumption very strong that the new trial granted was that which was asked for and had been denied upon an issue then in the case, but it is not to be believed, unless indicated by language to which no other construction can possibly be given, that the supreme court sent the case down with directions to try a question which was not before in the case, and which would award to the plaintiff damages for which he had not asked. Perhaps the statute of limitations had then run against the claim, and the defendants were thereby prevented from pleading it. The issue was twofold: Was there a fraudulent conspiracy to imperfectly mill the ores, as charged, and were the ores so milled to the injury of the mining corporation? If this be answered in the affirmative, the question then is, How much has the plaintiff been injured? Upon the first part of this inquiry the presumptions are with the defendants all through the case, both as to the

existence of fraud, and the extent of it. The presumption of innocence is one of the strongest disputable presumptions known to the law: Code Civ. Proc., sec. 1963, subds. 1, 19; Hunter v. Hunter, 111 Cal. 261, 52 Am. St. Rep. 180, 31 L. R. A. 411, 43 Pac. 756. The fraud being proven, upon the question of damage only are the presumptions against the wrongdoers. It is evident that the court entered upon the retrial upon the theory that the question of fraud had already been determined against the defendants, and that such finding had been affirmed by this court. It is entirely evident that there was no attempt to try the issue made by the pleadings, which was a claim for damages for milling the ores under a system of fraudulent and imperfect milling, which was intended to, and which did, run into the tailings, slimes and residues a large portion of the gold and silver contained in the ore, and which, by fair and honest milling, would have been extracted and saved for the benefit of the mining corporation. Practically, though not formally, the court found that the ores had been properly milled, when in its computations it gave defendants credit for the ascertained value of the tailings, slimes and residues, and charged them with the ascertained value of metal contained in the ore. Necessarily this would be, when formally stated, a finding in favor of the defendants upon the issue as to fraudulent and imperfect milling which is made by the pleadings.

But suppose the respondent's position can be maintained, that under the general allegations of fraud, notwithstanding the averments of particular acts, and of damages resulting from such acts, the plaintiff could maintain a claim for false returns made by the mill, and the purloining of bullion, still it is evident that the case was tried upon a wrong theory, because, as already stated, it was assumed that the alleged conspiracy was not only proven, but that the new and unpleaded charge of stealing the bullion was within the conspiracy. Respondent, in his brief, claims that such was the fact, and that the action of the court is to be judged from that standpoint. If it were so found in the first trial, and had this court decided that the finding was fully sustained by the evidence, yet the order granting a new trial would have set the whole matter at large. This court would then only have said that there was evidence sustaining the finding, not that it was sustained by the preponderance or the weight of the

evidence. But this court did not say anything of the kind. Denying a new trial upon the issue as to the alleged overcharge for milling did not imply anything of the kind. That was based upon the proposition that Hayward, Hobart and Levy controlled the mining corporation, and contracted with themselves for milling its ores. How they got control of the corporation was utterly immaterial upon that issue. Had it been gained in the most honest and honorable manner imaginable, the result would have been the same. Nor did the judgment imply, or did the evidence show, that the defendants had wronged the corporation out of a dollar. The corporation paid them what it would have been compelled to pay any other mill for the service. It could not have had the work done cheaper. That large judgment is sustained, not because the corporation was cheated out of the money, but under a rule of public policy which declares illegal contracts made by a trustee with himself, whereby he makes a profit, and compels him to pay over all the profit to his beneficiary, even though the beneficiary was not injured, and the profit would have been a fair profit but for the disability. But, if that finding were based upon a fraudulent conspiracy, it would have no bearing upon the question as to whether there was a further illegal agreement to defraud the corporation by making false returns of the bullion obtained from the ore, and by feloniously abstracting the bullion. The presumptions upon such further issue would still be in favor of the alleged conspirators. The burden of proof as to the whole issue is still with the plaintiff. In *Conard v. Nicoll*, 4 Pet. (U. S.) 291, 7 L. Ed. 862, the supreme court of the United States laid down certain rules as to proof of fraud, which have been often followed since: (1) Actual fraud is not to be presumed. (2) If the act may be attributed to an honest motive, equally as to a corrupt practice, the former is preferred. (3) "If the person against whom fraud is alleged should be proved to have been guilty of it in any number of instances, still, if the particular act sought to be avoided be not shown to be tainted with fraud, it cannot be affected by those other frauds, unless in some way it be connected with, or form a part of, them": See, also, *Estate of Kidder*, 66 Cal. 487, 6 Pac. 326; *Paxton v. Boyce*, 1 Tex. 319.

It is presumed, even in favor of a trustee, that he has done his duty; and when he has rendered an account of his

stewardship, which appears to be sufficient and fair, the account is presumed to be correct. In order to charge him with fraud or unfaithfulness, the beneficiary must falsify the account by evidence which does more than raise a suspicion. The evidence must be satisfactory, within the rule stated in section 1833 of the Code of Civil Procedure. It cannot be conjectured from the fact that the defendants are bad men, and have been guilty of other, independent frauds. I do not think guilt can be properly found from a comparison of a number of conjectures, or the addition of various approximate estimates, by which the court ascertained the value of the ore only "as nearly as practicable," when in the same finding the estimates upon which reliance is placed are shown to be twenty-eight per cent above the real value. By deducting from this estimate the amount of gold and silver which was estimated to have passed into the slimes, tailings and residues, and making another deduction for moisture, which certainly was simply guessed at even by the witnesses, the court found the amount of bullion which ought to have been returned, and determined that the difference between that sum and what was actually returned was purloined by the defendants in pursuance of a conspiracy to cheat and defraud the mining corporation. And it must be remembered that there does not appear to have been any suppression of evidence. This point is discussed on the first appeal, and it was so held there. But upon the last trial the employees of the mill were subjected to cross-examination, and answered fully, and with apparent candor. The books were produced, with clerks and bookkeepers, and the fullest scope for the investigation allowed. Hayward's private books were produced, and Hayward, Hobart and Levy have been upon the stand. All the employees who worked in the mill testified fully, and to the effect that every ounce of bullion which was extracted from the ore (except, perhaps, that recovered from the concentrates, which the mill company claimed) was honestly accounted for and returned to the mining company. Nothing of an inculpatory character was found in the books. Under such circumstances, nothing is to be presumed against the defendants as to this charge. And in weighing the evidence upon this charge the court should, at every step, have adopted the view which was consistent with innocence, unless the evidence to the contrary clearly preponderated. But

what is the evidence which implicates Hayward, Hobart or Levy in the supposed theft? There is certainly no evidence proving an express agreement or conspiracy to so defraud the mining company. In the absence of such proof, it must be shown that Hayward, Hobart and Levy personally participated in purloining the bullion; that they in some way aided, abetted or at least that some of the fruits of the fraud were received by them. This could be shown by circumstantial evidence. I have not been able to find in the record, including that upon the first appeal, a scintilla of evidence which tends to prove anything of the kind. The only evidence that bullion has been purloined is the discrepancy between the value of the ore as found, and the return made by the mill. Conceding that the discrepancy proves that some of the metal extracted was not returned, who took that which was not returned? It is conceivable that the employees could have taken and applied it to their own use. Indeed, if they did take it under circumstances that would subject them to a prosecution for felony, it would be strange that they would do it for the profit of others. Hayward and Hobart were not there. It is not shown that the defendants knew of or countenanced such theft, but, so far as their testimony and that of their employees could prove it, the contrary is shown. Not a pound of the bullion which is supposed to have been stolen has been traced to them, or to anyone else. One of the difficulties in the plaintiff's case is the number of confederates the conspirators would have been compelled to employ to enable them to carry out such a scheme. It is hard to believe that so many people, many of them well-to-do in the world, would have conspired to commit such a felony, or, if they did, that they would have trusted so many people with a secret which, if known, would consign them to the penitentiary. Another difficulty is in believing that about \$500,000 worth of bullion consisting of sixty per cent of silver and forty per cent of gold, was feloniously abstracted under such circumstances, and by the most thorough and searching investigation not one pound of it can be traced to anyone. The mill corporation would perhaps be responsible if the bullion was shown to have been extracted from the ore. But the defendants are not even sued as stockholders in the corporation. Proof that they controlled the corporation would not make them liable as conspirators. Stockholders have a

right to control the corporation of which they are constituents. This would not make them personally liable for thefts committed by their employees. To make them so responsible, guilty knowledge and participation must be shown, and much more so when they are simply charged as conspirators.

Probably, when the action was commenced, plaintiff hoped to be able to prove the fraudulent milling of the ores as alleged. Had he been able to do so, it would have been easy to believe that the fraud was perpetrated in pursuance of the same understanding or conspiracy under which the defendants obtained control of the mining corporation. It would also have proved a fraudulent appropriation of the property of another; that is, a taking under color and pretense of right, rather than an unblushing larceny, of which the defendants were in fact found guilty. It would also have been such a taking as would imply guilty participation on the part of the managers of the milling corporation. Their corrupt gains would be acquired only as stockholders. The control of the mining corporation, that there might be no complaints of ineffectual milling, and the participation of Levy in the profits derived from the slimes and tailings, if it could have been shown, would have favored the idea of a conspiracy. But when the plaintiff found that the milling had been thorough and efficient, and he was compelled to wage his battle from a new base, there were no facts so strongly favoring the idea of a conspiracy. In fact, the charge of a conspiracy was entirely irrelevant to the claim that bullion had been converted. If proven, conspiracy would have had no other effect than to connect the individual defendants with the trespass. The cause of action was the conversion. The conspiracy, if proven, was evidentiary merely. And then, if the bullion was converted by a larcenous taking, there is no presumption that it was done for the corporation or its stockholders, or even for the benefit or with the knowledge of those who, as owners of large amounts of stock, controlled the corporation. The great discrepancy between the mining-car assays and the return of bullion made is the only evidence upon which is based the finding that bullion has been converted. Does that fact tend to show that the conversion was in pursuance of a preconceived design on the part of Hayward, Hobart and Levy? The learned trial judge says it is beyond question that the battery assays are false, and remarks that for no

single month from January, 1887, to July, 1890, during which time more than 80,000 tons of ore were milled, did the percentage equal the car-sample assay, and adds: "Considering that all assays are somewhat speculative, and never absolutely exact, the fact that in all this mass of ore there was scarcely a single battery assay that even by chance went higher than the car assays is startling, in its evidence of deliberate, habitual design." Since the court found that the average of eighty-four thousand car-sample assays showed a value of twenty-eight per cent above the true value ascertained by him as nearly as practicable, and since he speaks in this very sentence of the assays as speculative, I doubt if there is any such implication in the fact. If the battery assays had frequently exceeded such car-sample assays, that fact would have condemned the battery assays. But, admitting that the difference is startling, how does that tend to prove that the conversion of the bullion, if there was any such conversion, was in pursuance of the alleged conspiracy? According to the theory of plaintiff, the defendants controlled both sets of assays. Why, then, did they allow this discrepancy to exist, if they were purloining the bullion, and were debasing the battery assays to hide the theft? The effort to show that the car assays were concealed was certainly a failure. There is at least a hint in the evidence that they were published daily. But, whether concealed or not, I do not see why such discrepant assays should have been allowed, if there was this design to purloin the bullion on the part of the personal defendants. In that case they were not wanted as a check on the mill. There might have been a motive for having the car assays too high, and that suspicion, if we are to indulge in suspicion, is as probable as the other. Perhaps some influential mine owners were then unloading. Certainly the discrepancy, however startling, cannot be accounted for upon the supposition that bullion was purloined by anyone, in the absence of other inculpatory circumstances; and, if such conversion were proven, the burden would still be upon the plaintiff to connect the appellants with it. That has not been done, and can only be made out by boldly claiming that this court went outside of its functions as an appellate tribunal, and found as a fact that there was a fraudulent conspiracy to defraud the mining corporation, and to purloin its bullion. I do not find any language in the opinion justify-

ing such claim, and, had there been, I doubt if we should feel bound by it. Certainly not unless it had been expressly and unmistakably so adjudged, and perhaps not then. Such a finding would not have bound the lower court, and therefore could not conclude this. Entertaining these views, it is not necessary to consider the numerous points raised as to the introduction of evidence at length.

1. I think the court erred in overruling the objections of defendants to the introduction as evidence of the books and statements of officers and bookkeepers of the Overman Silver Mining Company. The question is not simply whether the result of the reduction of the ore of that mine could be shown, and compared with the working of ore in the Nevada Mill. The objection is to the mode of proving the results of working ore in the Overman Mills. The case of *Insurance Co. v. Weide*, 9 Wall. (U. S.) 677, 19 L. Ed. 810, 11 Wall. (U. S.) 438, 20 L. Ed. 197, and 14 Wall. (U. S.) 381, 20 L. Ed. 894, does not seem to me to have any bearing upon this question. There the evidence offered was not, as here, the unverified statement of third parties, but was direct. Had the working of similar ores in other mills been shown by competent proof, for the purpose of comparison, I think it would have been proper, and that is all that was decided in the case cited which is pertinent here. The same remark applies to another class of testimony to which objection was made. I think it was incumbent upon the plaintiff both to show that by sampling and assaying the value of the ore could be ascertained, and also to show that it was done by the method pursued in this case. In fact, the first proposition is involved in the last. On no other theory could the plaintiff be sustained in putting questions to experts on the assumption that samples were fair samples, or were fairly taken, or that there were no disturbing elements. Of course, if the samples were fair samples, and were properly assayed, that would end the controversy. But the question at issue was whether they were fair samples—did truly represent the ore in the car—and whether they were properly assayed. The questions assumed the point at issue, unless that was whether by sampling and assay the value could be determined. The questions and answers did not tend to show whether the samples involved here were fair, or that the assays were correct. It seems to me that all the questions put by

plaintiff upon this subject assumed that the assays had been properly made.

2. The rule is that whenever a complaint is amended in any material respect, so as to present new questions upon which issue may be taken, the defendant may answer as of course; and in such case I do not see how the court can limit the defenses which may be interposed, any more than it could the defenses which might have been made in the first instance. The case is different where the court is asked to permit an amended answer to be filed. In this case I think the defendants had the right to answer, but I fail to perceive in what respect they have been damaged by the refusal. The amended complaint was allowed upon the first trial, to make it conform to the proofs. As to that trial, it served no other purpose. It should not be allowed in such case to present issues which have not been fully tried, and no advantage can be taken from the fact that some of the new allegations have not been controverted. The new trial was had after the amended complaint was filed. It is not contended that it is materially different from the former complaint, and the only injury claimed to have resulted is that the defendants could have pleaded the statute of limitations. It is not contended that the demand was barred when the action was commenced, or when summons was served on these defendants, but some of the defendants were sued by fictitious names. The summons was, however, personally served upon them. The complaint was amended so as to substitute the names of the defendants who had been served, for the fictitious names. Before this was done, it is thought, the limitation of the statute had accrued. I think the amendment was merely formal, and that the defendants were made parties in reality when the summons was served. True, they should still be made parties to the record as they were, but after that was done they are to be treated as having been parties from the time of service of process upon them. The answer already in was as appropriate to the complaint as amended as before the amendment, for it was in all material respects the same identical pleading.

The last point which it is necessary to consider is whether upon the new trial the question was still open as to the right of the plaintiff to bring this action as a stockholder of the Hale & Norcross Silver Mining Company. Evidence upon this subject was taken upon the first trial, and the court found fully

upon the subject. The facts which authorize the plaintiff to sue in behalf of the company were found. Upon the first appeal the defendants could have presented the question both upon the law and the evidence. By failing to except to the sufficiency of the evidence to sustain the findings, they waived that claim, and, there being no doubt as to the sufficiency of the findings to show the right of the plaintiff in that regard, this court necessarily concluded upon that record that the suit was properly brought. There was really no demand for a new trial—none that this court could entertain upon that ground—and no new trial upon that issue was awarded. The judgment here was an unusual one, no doubt. Appellants claim that, if the whole judgment was not vacated, it was one which this court had no power to make. They say this court can only affirm, modify or reverse the judgment appealed from; and, as they contend, the judgment was not affirmed or modified, and must have been reversed, as they also say it was in terms. The judgment, as pronounced here, reads: "The cause is therefore remanded to the superior court with the following directions, viz.: The judgment appealed from is set aside, and the superior court is directed to enter a judgment as of the date of its former judgment against Alvinza Hayward and H. M. Levy for the sum of \$210,197.50, with interest from that date, upon the issue presented by the claim for having paid an excessive price for milling the ore in the Mexican and Nevada Mills; and upon that issue the order denying a new trial is affirmed." As to another issue, specially mentioned, the order denying a new trial was reversed, and the court was directed to retry that issue, and certain directions were given as to the mode of trial. This judgment is not adequately described by quoting the first sentence, "The judgment appealed from is set aside." That sentence is limited and explained by what follows. The case was not sent back to be tried from the beginning. Evidently a part of what had been done was to stand—all, I think, except as to the issue upon which a new trial was awarded. No findings were set aside, except upon the one issue. Upon the new trial the case would be taken as partly tried, and the trial court was told to proceed to finish the trial as directed. That which was reviewed was the order denying a new trial. The judgment was no further interfered with than was inevitable after the ruling upon the order denying a new trial. The

judgment was set aside only to effectuate that ruling. So far as the judgment was supported by the findings not vacated, it was held in abeyance until the trial (which by the ruling was left incomplete) was finished, when one judgment would be entered, covering all the issues in the case. As to the order under review, it was affirmed in part and reversed in part, and this resulted in a modification of the judgment. So that in this case the court exercised its power in all the modes to which appellants claim it was confined. Although unusual, this action does not seem to me to be irregular, or at all suggestive of an excess of jurisdiction. It was all within the province of an appellate tribunal, and not beyond the power of this court as defined in the constitution. It must follow that the issue as to the right of plaintiff to prosecute the action as a stockholder was not open for investigation upon the last trial, either as to the issue upon which a new trial was denied, or upon that in regard to which a new trial was awarded. In fact, the direction to the trial court to proceed with the unfinished and incomplete trial was a ruling upon that matter. The court held that there was a case pending, and directed the superior court to proceed with the trial, and determine the one issue left open, in order that a final judgment could be made which would cover all the issues in the case. Of course, the order awarding a partial new trial may affect some general findings, so far as they determine matters brought in question in the special issue upon which a new trial was awarded. The right of plaintiff to sue was, however, the subject of a distinct issue, which was of the nature of a preliminary inquiry. Had that been found for the defendants, the court would not have proceeded to determine the other issues. When this court directed the trial court to proceed with the trial, it necessarily assumed that inquiry upon that subject was at an end. Nor do I think this conclusion a hardship upon the appellants. They had their day in court. The proper time for them to have presented the question was upon the first appeal. They did not avail themselves of the opportunity then offered. I do not see why they should have another. The judgment will therefore be, as upon the first appeal, that the judgment below is set aside and the superior court is directed to enter a judgment, as of the date of the first judgment, against Alvinza Hayward, H. M. Levy and the estate of W. S. Hobart, deceased, for the sum of

\$210,197.50, with interest from that date, upon the issue for having paid an excessive price for milling the ore in the Mexican and Nevada Mills. As to the issue presented by a claim for damages sustained by reason of imperfect and fraudulent milling a new trial is awarded, and the court is directed to proceed and try that issue, and make findings in accordance with the views hereinbefore expressed.

We concur: Beatty, C. J.; Henshaw, J.; Harrison, J.

VAN FLEET, J.—I concur in the judgment and generally in the views expressed by Mr. Justice Temple upon which it is based. Were the question of the correctness of the court's finding as to plaintiff's capacity to maintain the action open to inquiry upon this appeal, I should strongly incline to the view that it was not supported by the evidence. But I am unable to perceive wherein either the reasoning or conclusion of the main opinion upon that question can be successfully upset. As conclusively shown by Judge Temple, and as is indeed obvious, that finding was and is primarily essential to the validity of the judgment of the court below to any extent. Its correctness was in no manner attacked or questioned upon the former appeal. Upon that appeal the cause was remanded for a new trial solely as to the single issue of the alleged imperfect and fraudulent milling of the ore; and thereby, in all other respects, the findings and conclusions of the court below were manifestly as effectually sustained and affirmed as if so ordered in terms, since the lower court was left no power or discretion to reopen or disturb its findings or judgment in any other respect. In other words, our former judgment was equivalent to an express and final adjudication of the correctness of the proceedings of the court below in all respects other than the one particular as to which its action was reversed. Since this court has no power, under the constitution, to review its own final judgments (*Fox v. Mining Co.*, 112 Cal. 568, 571, 44 Pac. 1022), upon the going down of the remittitur upon that appeal the question as to the plaintiff's right to maintain the action was definitely and finally concluded.

McFARLAND, J.—I dissent from that part of the judgment which directs the court below to enter judgment against certain appellants for \$210,197.50, and from so much of the

principal opinion as leads to that result. I concur in all other respects in the opinion of Mr. Justice Temple. I am of the opinion, however, that the language of this court on the former appeal did not preclude the appellants, on the second trial, from making the point, as to the whole case, that the respondent was not a bona fide stockholder during the time when the alleged causes of action accrued, and therefore not entitled to maintain the action—a point which did not appear in the record on the former appeal, and was not on its merits then passed upon.

GAROUTTE, J.—I dissent. When this case was before the court upon the former appeal, I felt compelled to dissent from the conclusion then declared. By that conclusion it was held that the evidence was insufficient to justify the finding of fact made by the trial court to the effect that seventy-four per cent in bullion of the car-sample assay should have been returned to the Hale & Norcross Mining Company by the milling company. Upon the second trial of the case by the superior court, all the evidence introduced at the first trial was admitted, and in addition thereto other important evidence was introduced, bearing upon the issue as to the amount of bullion which should have been returned to the mining company. Upon the second trial the court found as a fact that sixty-seven per cent of the bullion as indicated by the car-sample assay would be a fair return to the mining company. It thus appears that at the second trial the percentage of bullion was reduced by the court, and at the same time the evidence upon the point strengthened. I am fully convinced that the evidence, as disclosed by the record, is amply sufficient to support this finding of fact made by the trial court. And I am therefore again compelled to dissent from that portion of the principal opinion wherein this particular issue is considered. Other questions of grave importance are involved in the appeal, and carefully considered in the opinion of the court. Owing to the press of other duties, I have not considered them, for the reason that my conclusion would not change the result of the litigation, even if by possibility such conclusion should happen to look in an opposite direction to the views therein declared.

ON REHEARING.

May 9, 1898.

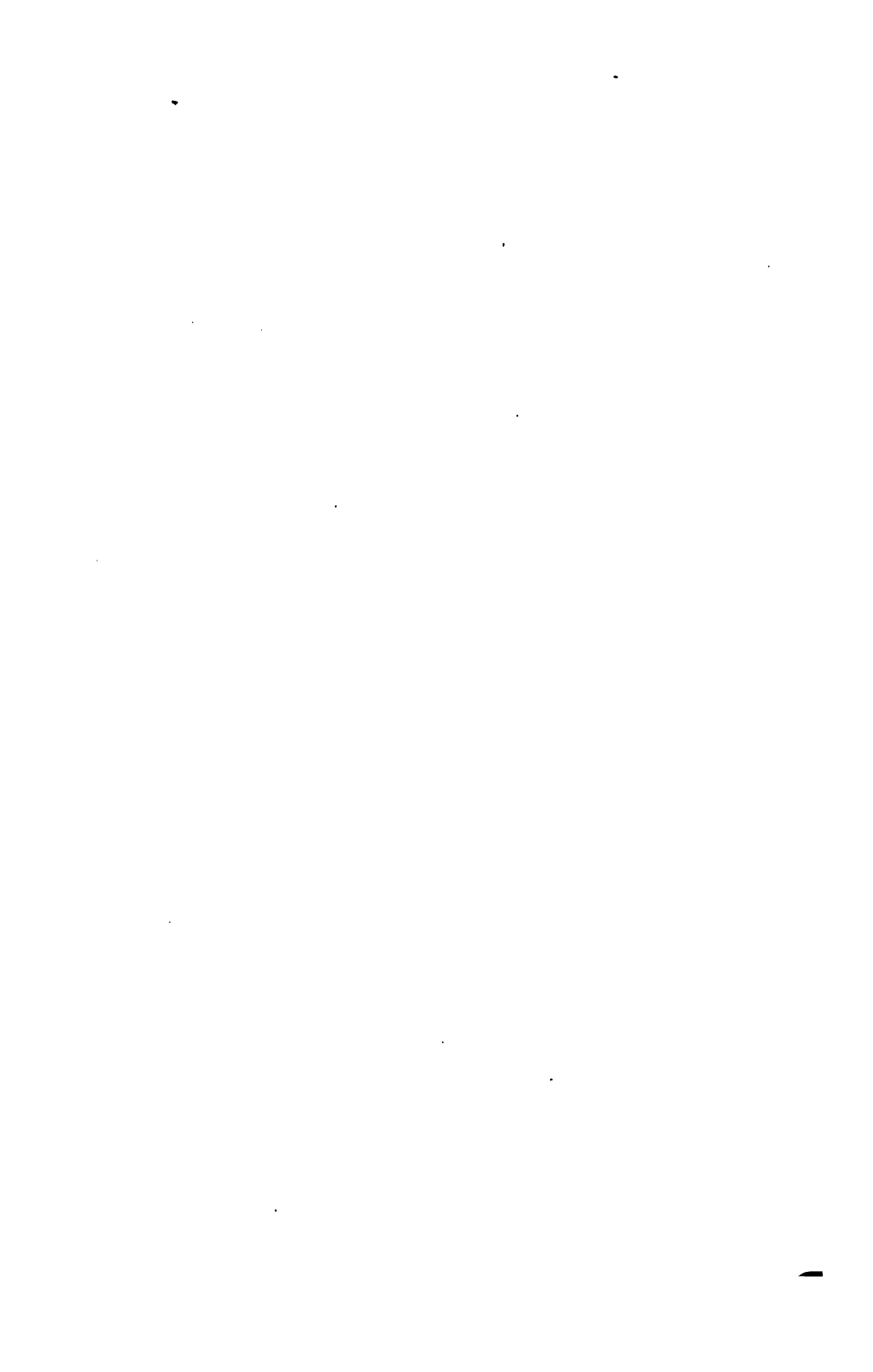
Rehearing.—A Reversal of a Judgment on Appeal will be Set Aside, on the ex parte application of the respondent for leave to remit a portion thereof, and for an affirmance of the remainder, to enable the court to consider such application on a rehearing, which will be limited to that proposition.

On application for rehearing. Granted.

PER CURIAM.—The respondent having made an ex parte motion for a modification of the judgment of reversal heretofore given, it is ordered that the said judgment be vacated and set aside in order that the court may consider the application of the respondent for leave to remit a portion thereof, and for an affirmance of the remainder. The rehearing will be limited to this proposition, and the respondent will serve notice of his motion upon the appellants.

McFARLAND, J.—I dissent from the whole of the foregoing order.

VAN FLEET, J.—I dissent. If the judgment of this court is to be set aside for any purpose, I think the order should be general.





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